Brooklyn Journal of International Law

Volume 32 | Issue 1 Article 1

2006

Internalizing European Court of Human Rights Interpretations: Russia's Courts of General Jurisdiction and New Directions in Civil Defamation Law

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INTERNALIZING EUROPEAN COURT OF HUMAN RIGHTS INTERPRETATIONS: RUSSIA'S COURTS OF GENERAL JURISDICTION AND NEW DIRECTIONS IN CIVIL DEFAMATION LAW

Peter Krug[*]

I. INTRODUCTION

Over the past several years, Russia's courts of general jurisdiction (Ordinary Courts) have made significant changes in Russia's system of civil defamation law.[1] In February 2005, utilizing its power to issue interpretations of legislation, the Supreme Court of the Russian

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1. For this paper, I will use the following definition of defamation: the private law (civil) system of legal protection, providing post-dissemination remedies including monetary compensation, against dissemination of false communications that harm individual reputation. This definition is based on the provisions of the system for protection of "Honor, Dignity, and Business Reputation" found in the Civil Code of the Russian Federation. *See* discussion *infra* Part IV.A.1.a. *See also* G.M. REZNIK & K.I SKLOVSKII, CHEST'. DOSTOINSTOVO. DELOVAIA REPUTATSIIA: SPORY S UCHASTIEM SMI [HONOR. DIGNITY. BUSINESS REPUTATION: DISPUTES INVOLVING MASS INFORMATION MEDIA] (Moscow: Statut, 2006) and the definition of "defamation" [*diffimatsiia*] in S.V. Potapenko, *Diffamatsiia i rossiiskaiia sudebnaia praktika v kontekste opyta Evropeiskogo suda po pravam cheloveka* [Defamation and Russian judicial practice in the context of the experience of the European Court of Human Rights] *in* 43 EVROPEISKII SUD PO PRAVAM CHELOVEKA I ZASHCHITA SVOBODY SLOVA V ROSSII: PRETSEDENTY, ANALIZ, REKOMENDATSII, (G.V. Vinokurov, A.G. Rikhter & V.V. Chernyshov eds., Institut problem informatsionnogo prava, 2004), *available at* http://www.medialaw.ru/article10/7/15.htm.

Defamation is one within a larger category of legal actions recognized in many European legal systems, including Russia's, for protection of individual personality rights, including individual reputation, dignity, and privacy. For example, in Russia the legal action of insult, separate from defamation with distinct elements, protects individual dignity against offensive statements. Regarding insult in the Russian legal system, see discussion *infra* note 83 and accompanying text. Because of the close relationship between defamation and insult, this article will examine aspects of both, but with far greater emphasis on the former. The article will not address the defamation provisions in Russia's Criminal Code, which have remained outside the scope of the re-assessment process examined herein.

Federation (SC) consolidated and made generally applicable throughout the ordinary court system a set of modifications,[2] a number of which certain lower courts had already applied in adjudication of discrete disputes. The simultaneous threshold steps in this process were the courts' expansion of the range of applicable sources of law beyond the Russian Federation Civil Code to include free expression guarantees in the European Convention on Human Rights (ECHR)[3]—an international treaty to which Russia acceded in 1998—and their internalization of the interpretative practice of the European Court of Human Rights (ECtHR).

Although it will examine closely certain lower court decisions that foreshadowed and accompanied the SC's 2005 Explanation, this Article is not a comprehensive empirical study of the operation of Russian civil defamation law.[4] Instead, the Article will focus on three inter-related inquiries: (1) the recent changes effected in civil defamation law and practice; (2) the nature of the judicial process of internalizing ECtHR interpretive practice; and (3) the potential implications for further development of the new approaches and expansion of their scope.

These developments have taken place within a context of intense external and internal scrutiny of the Russian legal system, particularly the ordinary courts, and the status of news media freedoms in Russia. For example, when Russia joined the Council of Europe in 1996, considerable skepticism was voiced about its ability to meet its membership obligations, particularly those under the ECHR.[5] Much of this skepticism

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2. *See* Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 2005, No. 4, p. 2, (Postanovlenie No. 3 Plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 24 Fevralia 2005 g. "O sudebnoi praktike po delam o zashchite chesti i dostoinstva grazhdan, a takzhe delovoi reputatsii grazhdan i iuridicheskikh lits" [Decree No. 3 of the Plenum of the Russian Federation Supreme Court dated February 24, 2005 "Concerning judicial practice in disputes regarding protection of individual honor and dignity, as well as the business reputation of physical and legal persons"]), *available at* http://www.supcourt.ru/vscourt_detale.php?id=2536 [hereinafter 2005 Explanation].

3. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, *available at* http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG [hereinafter ECHR]. The ECHR entered into force on September 3, 1953. *Id.*

4. In contrast, see the richly detailed empirical study of defamation law in the People's Republic of China, in Benjamin Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT'L L. J. 33 (2006).

5. The ECHR makes clear that the primary responsibility for its observance lies with the domestic legal systems of the member states themselves. ECHR, *supra* note 3, art. 1.

Russia's entry was accompanied by considerable doubt within the Council of Europe as to its readiness. The entry resolution was approved by the Parliamentary Assembly of the Council of Europe (PACE) on January 25, 1996—of 263 deputies, 214

centered on the ordinary courts and their perceived inexperience or inability to apply effectively constitutional provisions dictating the direct applicability and direct effect of Russia's international human rights treaties.[6] Severe criticism of Russia's human rights record has continued, with much of it directed at concerns about freedom of the press. These expressions of concern, in turn, often have singled out the system of civil defamation.[7]

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participated in the voting, with 164 voting to approve, 35 against, and 15 abstaining. Even more reflective of skepticism were the various Council of Europe reports at this time. *See* Mark Janis, *Russia and the 'Legality' of Strasbourg Law*, 8 EUR. J. INT'L L. 93, 98 (1997), *available at* http://www.ejil.org/journal/Vol8/No1/art5.html ("[G]iven Russia's lack of experience in protecting human rights at the level of municipal law, it is likely that a great many violations of European human rights law will be committed there, and that they will not be remedied domestically."); Maxim Ferschtman, *Russia*, *in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950-2000, 731, 731–35 (Robert Blackburn & Jorg Polakiewicz, eds. 2001); J.D. Kahn, *Russia's "Dictatorship of Law" and the European Court of Human Rights*, 29 REV. CENT. & E. EUR. L., 1, 3–4 (2004).

6. Gennady M. Danilenko, *Implementation of International Law in CIS States: Theory and Practice*, 10 EUR. J. INT'L L. 51, 58 (1999), *available at* http://www.ejil.org/journal/Vol10/No1/ab3.html [hereinafter Danilenko, *Implementation of International Law*] (The ordinary courts "have much less experience in applying international law than does the [Russian Federation] Constitutional Court."); Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AM. J. INT'L L. 451, 464, 466, 470 (1994) [hereinafter Danilenko, *New Russian Constitution*]. *See also* Tarja Långström, TRANSFORMATION IN RUSSIA AND INTERNATIONAL LAW, 430–31 (Martti Koskenniemi, ed., 2003).

7. In a March 2006 report on the status of defamation laws in the member states of the Council of Europe, the Council's Steering Committee on the Media and New Communication Services stated the following concerning Russia:

> Articles 151 and 152 of the Civil Code and Articles 129 and 130 of the Criminal Code are still being used by public figures in order to intimidate or silence hostile media. They are a serious impediment to the practice of investigative journalism, with its potential to publicise and thus to reduce incidents of corruption and wrongdoing in public life.

Council of Europe, *Steering Committee on the Media and New Communication Services (CDMC): Examination of the Alignment of the Laws on Defamation with the Relevant Case-Law of the European Court of Human Rights, Including the Issue of Decriminalisation of Defamation*, Doc. No. CDMC(2005)007 (Mar. 15, 2006), at 95, *available at* http://www.coe.int/T/E/human_rights/media/1_Intergovernmental_Co-operation/CDMC/CDMC%282005%29007_en.pdf.

In June 2005, PACE issued a report on the status of human rights protection in Russia. Sections 389–393 addressed defamation law. Section 389 stated in full:

> We are concerned by the current defamation legislation and its application by the Russian judiciary and executive powers. Journalists are often prosecuted

These challenges have included external and internal litigation. Externally, in July 2005, the ECtHR, ruled for the first time on a Russian defamation case, holding that Russia had violated the free expression guarantees in Article 10 of the ECHR.[8] The ECtHR also has found admissible at least seven other applications challenging ordinary court defamation decisions.[9] Internally, lawyers representing journalist and media entity defendants at the national and local levels[10] have made con-

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through libel suits (approximately 8–10,000 lawsuits a year). As reported by the Centre for Journalism in Extreme Situations, the number of prosecutions of journalists has increased significantly as from 2000. 49 criminal cases were opened in 2002 and, on average, 30–35 criminal proceedings were instituted against journalists in 2003–2004.

EUR. PARL. ASS., *Honouring of Obligations and Commitments by the Russian Federation*, Doc. 10568, ¶ 389 (2005), *cited in* EUR. PARL. ASS. RES. 1455 n.1 (June 22, 2005), *available at* http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1455.htm [hereinafter *Honouring of Obligations*].

For recent pessimistic assessments of the state of media freedoms in Russia, *see* INT'L RESEARCH & EXCHANGES BOARD [IREX], MEDIA SUSTAINABILITY INDEX 2005 183–91 (2005), *available at* http://www.irex.org/programs/MSI_EUR/2005/MSI05-Russia.pdf, and Andrei Richter, *Opportunities Lost*, THE MOSCOW TIMES, June 5, 2006, *available at* http://themoscowtimes.com/stories/2006/06/05/006.html (access requires payment, on file with the *Brooklyn Journal of International Law*).

8. Grinberg v. Russia, App. No. 23472/03, Eur. Ct. H.R. (2005).

9. The ECtHR found four applications admissible on December 9, 2004: Godlevskiy v. Russia, App. No. 14888/03, Eur. Ct. H.R. (2004); Krasulya v. Russia, App. No. 12365/03, Eur. Ct. H.R. (2004); Porubova v. Russia, App. No. 8237/03, Eur. Ct. H.R. (2004); and Zakharov v. Russia, App. No. 14881/03, Eur. Ct. H.R. (2004). The ECtHR also ruled the following applications admissible: Chemodurov v. Russia, App. No. 72683/01, Eur. Ct. H.R. (2005); Filatenko v. Russia, App. No. 73219/01, Eur. Ct. H.R. (2004); and Dyuldin and Kislov v. Russia, App. No. 25698/02, Eur. Ct. H.R. (2004). The decisions on the merits in all of these cases are pending as of mid-July 2006.

For discussion of the presentation of Russian mass media law cases to the ECtHR, see Viktor Monakhov, *Strasburg kak novaia tochka opory v dele zashchity rossiiskoi svobody massovoi informatsii* [*Strasbourg as the new fulcrum in the defense of freedom of mass information in Russia*], ZAKONODATEL'STVO I PRAKTIKA MASS-MEDIA [LAW AND PRACTICE IN MASS MEDIA], Feb. 2006, http://www.medialaw.ru/publications/zip/138/6.htm.

10. A number of these lawyers work on behalf of non-governmental organizations (NGOs). In January 2006, President Vladimir Putin signed legislation that imposes new requirements and limitations on NGO's. Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2006, No. 3, Item 282. For a description and critical analysis by one NGO representative (Coordinator of the Moscow Office of the Heritage Foundation), see Yevgeny Volk, *Russia's NGO Law: An Attack on Freedom and Civil Society* (May 24, 2006), *available at* http://www.heritage.org/Research/RussiaandEurasia/wm1090.cfm.

It is difficult at this point to assess the impact of this legislation on matters related to the subjects of this article. Was defamation, or legal matters generally, a concern of

certed efforts to present spirited defenses, including abundant references to ECtHR practice, in defamation litigation.[11]

At their core, the vocal criticisms and legal challenges to the operation of Russian civil defamation law have centered on two questions that in these particular circumstances became closely intertwined: (1) a defamation law doctrinal question concerning identification of the applicable sources of law; and (2) a constitutional law question concerning the domestic incorporation of international treaty norms and the internalization of ECtHR interpretations of the ECHR in particular.[12] These issues will be the topic of Parts III–IV of this Article, which follow a description of the ordinary court system in Part II. Part V will describe the most significant practical applications of the new, multi-source system of civil defamation law, and Part VI will examine the potential implications of the new approach, including the SC's mandate that the ordinary courts "take

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Russia's lawmakers in enacting this legislation? Is defamation (or law generally) distant enough from more immediate political concerns? These considerations must remain outside the scope of this article.

11. *See infra* notes 120 & 196 and accompanying text.

12. I refer to this as a constitutional law question because the Constitution, Article 15(4), serves as the conduit for incorporation of international treaty norms in the Russian legal system. *See* discussion *infra* note 98 and accompanying text.

While there is a rapidly expanding literature on the domestic incorporation of international norms, *see, e.g.*, W.E. Butler, *National Treaty Law: Russia, in* NATIONAL TREATY LAW AND PRACTICE 537–80 (Duncan B. Hollis, Merritt R. Blakeslee, & L. Benjamin Ederington eds., 2005), the domestic legal effect of extra-national judicial interpretation of those norms has received comparably less attention. *See generally* Mohammed Bedjaoui, *The Reception by National Courts of Decisions of International Tribunals, in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 21 (Thomas M. Franck & Gregory H. Fox, eds., 1996); Sarita Ordonez & David Reilly, *Effect of Jurisprudence of the International Court of Justice on National Courts*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 335 (Thomas M. Franck & Gregory H. Fox, eds., 1996). As to Russia and the legal effect of ECtHR interpretations of the ECHR, see M.N. Marchenko, *Iuridicheskaia priroda i kharakter reshenii Evropeiskogo Suda po pravam cheloveka* [*Legal nature and character of European Court of Human Rights decisions*], GOS. I PRAVO, Feb. 2006, at 11; V.D. Zor'kin, *Konstitutsionnyi sud Rossii v evropeiskom pravovom pole* [*The Russian Constitutional Court in the European legal sphere*], ZH.R.P., Mar. 2005, at 3, 7–9; Anna Valentinovna Demeneva, Iuridicheskie posledstviia postanovlenii Evropeiskogo suda po pravam cheloveka dlia Rossiiskoi Federatsii [Legal consequences for the Russian Federation of European Court of Human Rights judgments] (2004) (unpublished Master of Laws dissertation, Urals State Legal Academy, Ekaterinburg, Russia) (on file with the *Brooklyn Journal of International Law*); V.A. Kanashevskii, *Pretsedentnaia praktika Evropeiskogo suda po pravam cheloveka kak reguliator grazhdanskikh otnoshenii v Rossiiskoi Federatsii* [*Precedential practice of the European Court of Human Rights as a regulator of civil relations in the Russian Federation*], ZH.R.P., Apr. 2003, at 122.

into account" ECtHR practice in their decision-making,[13] for remaining defamation law issues.

II. THE ORDINARY COURTS

The ordinary court system is the largest of the three parallel branches of the federal judicial system in Russia, the other two being the Constitutional Court of the Russian Federation (CC) and the *Arbitrazh* (or commercial) courts.[14] With certain exceptions not relevant to this Article,[15] all courts in Russia are part of the federal judiciary.[16]

With the exception of the SC in Moscow at its apex, the ordinary court system is organized on a territorial basis, with separate hierarchical structures within each of the eighty-nine component units (Subjects) of the Russian Federation.[17] Within the Subjects, the lowest level courts are the justice of the peace courts, whose limited competence does not include the adjudication of defamation disputes.[18] Above these courts in the hierarchy are the district courts, which usually function as courts of first instance in disputes outside the competence of the justice of the peace courts, and as appellate bodies for decisions by those courts.[19] The highest level bodies, the Subject-level courts,[20]are divided into civil and

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13. For further discussion on the "take into account" directive, see *infra* Part IV.B.2.

14. For detailed descriptions of the judicial system in Russia, including aspects discussed throughout Part II, see WILLIAM BURNHAM, PETER B. MAGGS & GENNADY M. DANILENKO, LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION, 49–129 (3d ed., 2004) [hereinafter BURNHAM ET AL.]; WILLIAM E. BUTLER, RUSSIAN LAW (2d ed. 2003); and Peter Krug, *Departure from the Centralized Model: The Russian Supreme Court and Constitutional Control of Legislation*, 37 VA. J. INT'L L. 725, 729–33 (1997) [hereinafter Krug, *Departure*].

15. The Subjects (federal units) of the Russian Federation may establish their own constitutional, or "Charter," courts, which have jurisdiction to review the compatibility of Subject legislation and sub-legislative acts with Subject Constitutions or Charters. BURNHAM ET AL., *supra* note 14, at 41, 54–56. In addition, the Subjects may establish "Justice of the Peace" courts, which occupy the lowest level of the ordinary court system. *Id.*

16. *Id.* at 52–54.

17. *Id.* at 73–77; Krug, *Departure*, *supra* note 14, at 731–33. Under Article 65 of the Constitution, the various Subjects have different designations. For example, among other designations, twenty-one Subjects are named "Republics," forty-nine others are "Regions" [*oblasti*], and two (Moscow and St. Petersburg) are "Federal Cities." BURNHAM ET AL., *supra* note 14, at 41, 75; Butler, *supra* note 14, at 159–60; and Krug, *Departure*, *supra* note 14, at 725 n.1.

18. BURNHAM ET AL., *supra* note 14, at 55–56, 73–74.

19. *Id.* at 74–75.

20. The Subject-level courts have different names, depending on the type of Subject in which they are located. In Republics of the Russian Federation, they are called supreme courts (of the particular Republic). In the two federal cities, Moscow and St. Pe-

criminal chambers. Although they operate as first instance courts in certain categories of disputes, these Subject-level courts serve primarily as appellate bodies for decisions from the district courts.[21] Each of the latter courts also has a Presidium, a body made up of the President and certain other judges of the subject-level court, which is empowered in certain circumstances to review decisions of the civil and criminal chambers.[22]

In the 1990s, the ordinary courts became the leading arena for examination of doctrinal issues in civil defamation law.[23] They continue to play this role today, due in large part to the allocation of judicial competence in Russia.

A. The Allocation of Judicial Competence

The ordinary courts have competence over all matters not allocated exclusively to the CC or the *Arbitrazh* courts.[24] The *Arbitrazh* courts have exclusive competence over disputes involving one or more parties engaged in entrepreneurial and other forms of economic activity. As to jurisdiction over defamation disputes, the ordinary courts exercise competence over all cases except those that fall within the exclusive jurisdiction of the *Arbitrazh* courts.[25] Some important and controversial litigation has taken place in the *Arbitrazh* courts; however, little consideration of doctrinal questions has taken place in those courts.[26]

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tersburg, they are "city courts." Most Subject-level courts are located in "regions" and therefore are called "regional courts." *Id.*

21. BURNHAM ET AL., *supra* note 14, at 75–76; Krug, *Departure*, *supra* note 14, at 731–32.

22. BURNHAM ET AL., *supra* note 14, at 71.

23. Peter Krug, *Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution*, (pts. 1 & 2), 13 CARDOZO ARTS & ENT. L.J. 847 (1995), 14 CARDOZO ARTS & ENT. L.J. 297 (1996).

24. On allocation of judicial competencies generally, see BURNHAM ET AL., *supra* note 14, at 50–52, 70, 73–78, 81–129. Regarding the CC's jurisdiction, see also T.G. Morshchakova, *Konstitutsionnyi Sud Rossiiskoi Federatsii* [*Constitutional Court of the Russian Federation*], *in* SUDEBNAIA VLAST' [THE JUDICIAL POWER], 336–342 (I.L. Petrukhin ed., 2003).

25. The Arbitrazh Procedure Code of the Russian Federation, art. 33, para. 5, grants the *Arbitrazh* courts competence over disputes "concerning the protection of business reputation in the sphere of entrepreneurial and other economic activity." Arbitrazhno-Protsessual'nyi Kodeks RF [Arbitrazh Procedure Code of the Russian Federation], Federal Law No. 95-FZ, Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2002, No. 30, Item 3012. The SC also confirmed this grant of competence in the 2005 Explanation, *supra* note 2, § 3, which stated that this competence is exclusive.

26. There is one exception to this statement. In the late 1990s, several decisions of the Supreme *Arbitrazh* Court Presidium rejected legal persons' claims for monetary compen-

Meanwhile, although the CC has competence to adjudicate individual complaints alleging unconstitutionality of legislative acts,[27] it has not ruled on substantive defamation law questions. This is because the CC has viewed these as matters of judicial law application, and it lacks competence to review the constitutionality of judicial acts.[28] The CC has

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sation for non-economic harm, ruling (in contrast to the Supreme Court) that a legal person cannot experience the "pain and suffering" which is a prerequisite for the "moral damages" remedy. However, in July 2005, a three-judge panel of the Supreme *Arbitrazh* Court denied a petition that sought supervisory review by the Court's Presidium of lower court decisions that granted the moral damages remedy to a legal person in the highly visible case of *Al'fa Bank v. Kommersant*. Al'fa Bank v. Kommersant (July 21, 2005) (on file with the *Brooklyn Journal of International Law*). The author is grateful to Dr. Andrei Richter, Director of the Moscow Media Law and Policy Institute, for his assistance in obtaining this judgment. Regarding the *Al'fa Bank* litigation, see Peter Krug, *Legal Persons and Compensation for Harm to Business Reputation: The Civil Code, Judicial Practice, and Freedom of the Press*, *in* REMAKING THE ROLE OF LAW: COMMERCIAL LAW REFORM IN RUSSIA AND THE CIS, (Kathryn Hendley, ed., Juris Publications, forthcoming 2006) [hereinafter Krug, *Harm to Business Reputation*]. Regarding the moral damages remedy, see discussion *infra* notes 76–79 and accompanying text.

27. Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 125(4). This is a power of concrete, not abstract, review: in other words, the complainant must show that the legislative act in question was applied or would be applied in a discrete case. Absence of precision in the constitutional text has yielded considerable controversy over the question of whether the ordinary courts also have the power to hold legislative acts unenforceable in concrete cases because they conflict with the federal Constitution. *See* BURNHAM ET AL., supra note 14, 82–120; Krug, *Departure*, *supra* note 14.

28. The grant of competence to adjudicate individual complaints in Article 125(4) of the Constitution is limited to review of legislative acts only, and no other constitutional provision extends the CC's competence to review judicial acts. *See* Federal'nyi konstitutsionnyi zakon "O Konstitutsionnom Sude Rossiiskoi Federatsii" [Federal Constitutional Law "On the Constitutional Court of the Russian Federation"] Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1994, No. 13, Item 1447, art. 3, *reprinted in* 31 STATUTES AND DECISIONS: THE LAWS OF THE USSR AND ITS SUCCESSOR STATES, No. 4 (July/Aug. 1995) (S.J. Reynolds, ed.) [hereinafter, CC Statute]. *See also* BURNHAM ET AL., *supra* note 14, at 82; Krug, *Departure*, *supra* note 14. Thus, in this regard, the CC's powers are considerably more limited than those of its leading model, the German Federal Constitutional Court, which includes review of judicial acts within its competence. DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 14–15 (2d ed. 1997).

In determining the constitutionality of a legislative act, the CC *is* authorized to identify and take into account the ordinary courts' construction of that act as reflected in its practice. CC Statute, *supra*, art. 74(2). The CC has used this provision to articulate what it views as the constitutionally permissible interpretation of the legislative act in question and to direct all law-applying agencies, including the ordinary courts, to employ it in future adjudications even if it differs from the ordinary courts' construction. *See, e.g.*, the CC's February 27, 2003 Decree No. 1-P, § 6, Sobranie Zakonadetl'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2003, No. 10,

maintained this position since denying, on these grounds, the admissibility of a defamation defendant's complaint in 1995.[29]

Because the CC lacks authority to review judicial acts, and the *Arbitrazh* court system is completely separate from that of the ordinary courts, the allocation of competencies ensures that the ordinary courts have broad autonomy within their zone of competence to interpret and apply the norms of international agreements to which Russia is a party. This authority therefore extends to the ordinary courts' consideration of international norms in their construction of domestic legislation.[30] As a result, as will be discussed below, the ordinary courts as a system have been free to fashion their own approaches to the questions of the relationship between international norms, such as those in the ECHR and domestic defamation law.

B. The Ordinary Courts and Judicial Authority

The judicial actions examined in this Article are of two types: (1) the Supreme Court's issuance of abstract, generally applicable "Explana-

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Item 953. However, whatever the degree of bindingness of such determinations, they do not approximate a power to exercise repressive review and declare unenforceable discrete ordinary court decisions.

29. *Opredelenie Konstitutsionnogo Suda RF ot 27 sentiabria 1995 g. N. 69-O "Ob otkaze v priniatii k rassmotreniiu zhaloby grazhdanina Kozyreva Andreia Vladimirovicha" [Decision of the Russian Federation Constitutional Court of September 27, 1995 "On denial of admission of the complaint of citizen Andrei Vladimirovich Kozyrev"]*, VKS, June 2006, at 2, *reprinted in* ROZ. GAZ., Nov. 22, 1995, at 3, *available at* http://www.ksrf.ru:8081/SESSION/S__oklOtZL3/PILOT/main.htm. For detailed discussion, see Krug (pt. 2), *supra* note 23, at 303–07. *See also Opredelenie Konstitutsionnogo Suda RF ot 27 Maia 2004 g. N. 186-O "Ob otkaze v priniatii k rassmotreniiu zhaloby grazhdanki Zarovniatnykh Eleny Nikolaevny na narushenie ee konstitutsionnykh prav stat'iami 297 i 298 Ugolovnogo kodeksa Rossiiskoi Federatsii" [Decision of the Russian Federation Constitutional Court of May 27, 2004 "On denial of admission of the complaint of citizen Elena Nikolaevna Zarovniatnykh claiming violation of her constitutional rights by Articles 297 and 298 of the Russian Federation Criminal Code"]*, http://www.ksrf.ru:8081/SESSION/S__YgrRccHv/PILOT/main.htm. In this decision, the CC denied the admissibility, on grounds similar to those in Kozyrev, of a complaint challenging the constitutionality of Articles 297 ("Disrespect Toward the Court") and 298 ("Defaming of Judges and Other Judicial Personnel") of the Criminal Code. Theoretically, the CC would be competent to review the constitutionality of the defamation legislative base itself, but it did state in the *Kozyrev* decision (without making a formal determination) that the applicable Civil Code provisions appeared to have a constitutional basis. To this author's knowledge, the CC since that time has not been presented with a complaint alleging the unconstitutionality of the civil defamation legislative base itself.

30. In regard to the CC's authority under Article 74(2) of the CC Statute, *supra* note 28, it does not appear that the CC ever has invoked Article 74(2) to examine the conformity to international treaty norms of ordinary court applications of legislative acts.

tions;" and (2) the adjudication by all ordinary courts of discrete disputes.

1. Explanations of the SC

The SC's powers are multi-dimensional.[31] They include, in addition to the SC's indirect influence over judges through the exercise of its administrative authority over the entire ordinary court system,[32] the issuance of interpretive Explanations and powers of appellate and supervisory review over discrete lower court decisions.[33] For purposes of this Article, the issuance of Explanations is the most important function: the SC's acts most directly relevant to the development of civil defamation law were all Explanations issued in 1992 (amended in 1993 and 1995),[34] 2003,[35]

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31. *See* BURNHAM ET AL., *supra* note 14, at 76–77.

32. *See* Krug, *Departure*, *supra* note 14, at 736–37.

33. *Id.* at 732–35.

34. Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 1992, No. 11, p. 7, *available at* http://www.supcourt.ru/vscourt_detale.php?id=889 (Postanovlenie Plenuma No. 11 ot 18 avgusta 1992 goda Verkhovnogo Suda Rossiiskoi Federatsii "O nekotorykh voprosakh voznikshikh pri rassmotrenii sudami del o zashchite chesti i dostoinstva grazhdan i iuridiheskikh lits" [Decree No. 11 from 18 August 1992 of the Plenum of the Russian Federation Supreme Court "Concerning Several Questions Arising in Consideration by the Courts of Cases Concerning Defense of Honor and Dignity of Citizens and the Business Reputations of Citizens and Businesses"]). Certain provisions of this Decree were amended in 1993 and 1995. For the 1993 amendments, see Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 1993, No. 3, p. 8, *available at* http://www.supcourt.ru/vscourt_detale.php?id=919 (Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii N. 11 ot 21 dekabria 1993 g. "O dopolnenii i izmenenii nekotorykh postanovlenii Plenuma Verkhovnogo Suda Rossiiskoi Federatsii" [Decree No. 11 of the Plenum of the Russian Federation Supreme Court from 21 December 1993 "Concerning Additions and Amendments to Certain Decrees of the Plenum of the Russian Federation Supreme Court]). For the 1995 amendments, see Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 1995, No. 7, p. 4, *available at* http://www.supcourt.ru/vscourt_detale.php?id=4134 (Postanovlenie N. 6 Plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 25 aprelia 1995 g. "O vnesenii izmenenii i dopolnenii v nekotorye postanovleniia Plenuma Verkhovnogo Suda Rossiiskoi Federatsii" [Decree No. 6 of the Plenum of the Russian Federation Supreme Court from 25 April 1995 "Concerning the Insertion of Amendments and Additions into Certain Decrees of the Plenum of the Russian Federation Supreme Court"]). Hereinafter, the 1992 Decree and 1993 and 1995 amendments will be referred to collectively as the "1992 Explanation."

35. Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 1995, No. 12, p. 3, *available at* http://www.supcourt.ru/vscourt_detale.php?id=1961 (Postanovlenie N. 5 Plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 10 oktiabria 2003 g. "O primenenii sudami obshchei iurisdiktsii obshchepriznannykh printsipov i norm mezhdunarodnogo prava i mezhdunarodnykh dogo-

and 2005.[36] To this author's knowledge, the SC's last substantive adjudicative decision in a discrete defamation law case was in 1997.[37]

This interpretive function is vitally important for two reasons.[38] First, it plays an important role in defining the normative base, serving as a gap-filler to refine ambiguous or unaddressed questions in statutory texts. Second, it serves as an integral means of promoting uniformity of decision-making throughout the vast ordinary court system.[39] Explanations are of great importance for the practice of the ordinary courts, which often cite to them in their decisions.[40]

Although debate remains on the question of whether the Explanations constitute a binding source of law, it is apparent that consensus exists for the proposition that they are, at the least, "an important and effective instrument of judicial power."[41] Thus, Explanations have direct, immediate, prospective effect throughout the entire ordinary court system.

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vorov Rossiiskoi Federatsii" [Decree No. 5 of the Plenum of the Russian Federation Supreme Court "Concerning the Application by the Courts of General Jurisdiction of Generally-recognized Principles and Norms of International Law and International Treaties of the Russian Federation"]) [hereinafter October 10, 2003 Explanation].

36. *See* 2005 Explanation, *supra* note 2.

37. This decision was the Vologda decision. *See* discussion *infra* note 108 and accompanying text. In 2003, however, the SC's Civil Chamber did address a Volgograd Province law that imposed administrative sanctions for communications insulting local public officials. The Chamber ruled that the lower court's application of the law was unconstitutional because the law lacked sufficient clarity. In its decision, the Chamber discussed the problematic aspects of the law under the freedom of expression provisions in Article 29 of the Constitution and Article 10 of the ECHR. The opinion in the decision of E.M. Shusterman, No. 16-GOZ-1 (Verkh. Sud RF Feb. 10, 2003), *partially reversing*, http://www.medialaw.ru/article10/7/11.htm. (To this author's knowledge, the opinion was not published in any official publication.)

38. E.B. Abrosimova, *Pravovoi status Verkhovnogo Suda Rossiiskoi Federatsii* [*Legal Status of the Supreme Court of the Russian Federation*], *in* SUDEBNAIA VLAST', *supra* note 24, 359–61.

39. Among other reasons, this is significant because of the absence of a tradition of recognizing binding judicial precedent in the ordinary courts. *See* Peter B. Maggs, *Judicial Precedent Emerges at the Supreme Court of the Russian Federation*. 9 J.E. EUR. L. 479 (2002) (identifying a developing acceptance at the SC level of bindingness of certain SC decisions, particularly in the invalidation of administrative regulations). *See also* BURNHAM ET AL., *supra* note 14, at 18–19; Sergei Potapenko, *Pravovaia pozitsiia verkhovnogo suda RF po diffamatsionnym sporam* [*Legal positions of the Russian Federation Supreme Court concerning defamation disputes*], SUD'IA [JUDGE], Apr. 2005, *available at* http://www.supcourt.ru/news_detale.php?id=2601 [hereinafter Potapenko 2005].

40. Abrosimova, *supra* note 38. *See also* BURNHAM ET AL., *supra* note 14, at 20–22.

41. I.L. Petrukhin, *Vvedenie* [*Introduction*], *in* SUDEBNAIA VLAST', *supra* note 24, at 11 ("[M]any jurists consider them authoritative and refer to them as sources of law."). *See also* Abrosimova, *supra* note 38, at 360–61 (stating that Explanations operate as a

The promulgation of these interpretations bears certain hallmarks of legislative process. Members of the Plenum review and discuss preliminary drafts, and often outside parties, both from other governmental agencies and representatives of public organizations, are invited to comment on drafts and to speak at the Plenum.[42]

2. Adjudication and Hierarchy in the Ordinary Courts

Supervision of the adjudicatory acts of the ordinary courts lies exclusively within the ordinary court system. Review by higher level regional courts, as well as the Supreme Court, can take place in one of two ways (or both, as often is the case): appellate review and discretionary supervisory review.[43] The SC's adjudicative functions lie almost entirely in the appellate and supervisory review of its civil and criminal chambers, and the power of supervisory review that the Presidium exercises over Chamber decisions.[44] The effectiveness of Explanations is anchored by the systems of hierarchical administration and discrete case review in the ordinary courts.

III. THE SOURCES OF LAW QUESTION IN DEFAMATION LAW

In seeking to protect individual reputation, defamation law by its nature implicates the activity that produces the perceived harm—the dissemination of communication. Thus, the question is raised as to the function of normative guarantees protecting freedom of expression: do they represent only expressive interests for lawmakers to consider in fashioning the binding, generally applicable rules of a defamation normative system, or are they among the sources of law that courts must interpret and apply in adjudicating discrete defamation disputes? This is the sources-of-law question that many domestic legal systems have confronted over the past half-century: whether striking the balance between the countervailing interests in defamation is the exclusive authority of lawmakers, or is an exercise susceptible to the intervention of other sources of law in the form of freedom-of-expression guarantees found in constitutional or international norms ("external norms"). The former ap-

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source of law); Danilenko, *Implementation of International Law*, *supra* note 6, at 58; BURNHAM ET AL., *supra* note 14, at 20–22.

42. *See* BURNHAM ET AL., *supra* note 14, at 20–21, 76–77. *See also infra* notes 123–36 and accompanying text (describing the December 23, 2004 Plenum's consideration of the draft that became the 2005 Explanation).

43. For description, see BURNHAM ET AL., *supra* note 14, at 62–63; Krug, *Departure*, *supra* note 14, at 733–35.

44. *See* BURNHAM ET AL., *supra* note 14, at 62, 76; Krug, *Departure*, *supra* note 14, at 732–35.

proach, under which the defamation normative base is insulated from external norm intervention, I will call the "autonomy principle;" the latter I will call the "plurality principle."

When a given legal system's normative order includes freedom-of-expression guarantees in either a constitution or an applicable international agreement,[45] or both, its identification as one adhering to either the autonomy or plurality approach will depend on two criteria:[46] (1) "accessibility"—whether external norms generally are directly applicable in the legal system and may be invoked by individuals;[47] and (2) "applicability"—whether the judiciary has recognized the operation of reputational protections as an "interference" with the exercise of rights guaranteed under such external norms.[48] If external norms meet both criteria and

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45. These considerations are outside the question of whether freedom of expression generally is a norm of customary international law.

46. These matters concern in part the domestic status of international law norms, including customary (general) international law, in domestic systems that are viewed either as monist or dualist. In the latter, international norms lack legal effect within the domestic legal order in the absence of some affirmative act such as a constitutional provision or legislative act. Thus, the sources-of-law question in defamation law exists regardless of whether the legal system is monist or dualist. In the sources of law question, the issue is not the legal system's *general* stance toward incorporation of international norms; instead, it is whether the judiciary in concrete cases will recognize the operation of a private defamation law system as an interference with the exercise of rights guaranteed under an incorporated international norm.

The USSR adhered to a strictly dualist approach to these questions, while Article 15(4) of the 1993 Russian Constitution, *see infra* note 98 and accompanying text, has moved Russia away from this stance. *See* Danilenko, *Implementation of International Law*, *supra* note 6, at 52. The Russian Federation still retains certain hallmarks of dualism, however, as illustrated by Article 5(3) of the Russian Law on Treaties [Rossiiskaia Federatsiia Federal'nyi Zakon "O mezhdunarodnykh dogovorakh Rossiiskoi Federatsii" Federal Law No. 101-FZ, Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1995, No. 29, Item 2757, which states that in certain circumstances (not relevant to the defamation law questions examined in this article) the incorporation of treaty norms requires enactment of implementing domestic legislation. *See* WILLIAM E. BUTLER, THE LAW OF TREATIES IN RUSSIA AND THE COMMONWEALTH OF INDEPENDENT STATES 36–38 (2002); BURNHAM ET AL., *supra* note 14, at 35.

47. These correspond to the principles of direct applicability and direct effect.

48. The terms "accessibility" and "applicability," as used here, are my own. "Interference," a term taken from ECHR Article 10(1), is not synonymous with "violation" of protected rights. Instead, a finding of interference is a pre-condition for determination of whether the act constituted a violation. Recognition of an interference is only the first (but necessary) step toward resolution of the question of a violation. In defamation law, the core interference question is whether subsequent punishment for a defamatory communication implicates the exercise of freedom of expression or whether interferences are limited solely to prior restraints on dissemination.

therefore are what I will call "active," then the legal system follows the plurality principle. On the other hand, if external norms are generally accessible but not applicable in the defamation context, they are what I will call "passive." In such circumstances, the legal system adheres to the autonomy principle.

For example, it was the recognition of external norms in the 1960s that led to the "constitutionalization" of defamation law in Germany[49] and the United States.[50] In the 1980s, the ECtHR introduced a new dimension into this process: the applicability of an international norm, Article 10 of the ECHR, to domestic systems of reputational protection.[51] In the ECtHR's seminal 1986 *Lingens v. Austria* decision,[52] the applicant was a journalist who had been found guilty in a criminal prosecution for a defamatory communication. The ECtHR applied to the defamation context its standard approach to applications based on Article 10, treating the

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49. The term "constitutionalization" is borrowed from BASIL S. MARKESINIS & HANNES UNBERATH, THE GERMAN LAW OF TORTS: A COMPARATIVE TREATISE 28–32 (4th ed. 2002) (describing the intervention of constitutional ideas into the sphere of private law in Germany, beginning particularly with the German Federal Constitutional Court's 1958 *Luth* decision). *See also* Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247 (1989); KOMMERS, *supra* note 28, at 361–71; Mattias Kumm, *Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L. J. 341 (2006), *available at* http://www.germanlawjournal.com/article.php?id=723.

50. See the landmark U.S. Supreme Court decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), in which the Court for the first time recognized the First Amendment as applicable to common law defamation. *Cf.* the Court's decision in *Patterson v. Colorado*, 205 U.S. 454 (1907), in which recognized First Amendment interferences were limited strictly to prior restraints. A forerunner of *New York Times v. Sullivan* was the Court's decision in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), in which the Court recognized a subsequent punishment scheme as an interference with the exercise of First Amendment rights (stating that in "operation and effect" the scheme operated like a prior restraint). *Near*, 283 U.S. at 708–13.

51. Article 10 is set forth *infra* text accompanying note 96. Under Article 10, as interpreted by the ECtHR, the sources-of-law question centers on application of Article 10(1). If that provision is deemed applicable, then it is possible that application of one or more of the legitimate restrictions in Article 10(2), along with the "necessary in a democratic society" test, will operate to uphold the appropriateness of the state's interference. ECHR, *supra* note 3, art. 10.

There is a sizeable literature on the ECtHR's Article 10 jurisprudence. For citations, see the recent study by Dan Kozlowski, *"For the Protection of the Reputation or Rights of Others": The European Court of Human Rights' Interpretation of the Defamation Exception in Article 10(2)*, 11 COMM. L. & POL'Y 133 (2006).

52. Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A) at 11 (1986). In addition to its acceptance of subsequent punishment as an Article 10(1) interference, *Lingens* was the ECtHR's first decision to interpret the "for the protection of the reputation or rights of others" restriction in Article 10(2). *See* Kozlowski, *supra* note 51, at 141.

"interference by a public authority" as the threshold determination.[53] If an interference is found, the ECtHR then will examine the interference under the requirements of Article 10(2) to decide if it is a violation of the ECHR, an exercise that will entail determinations of whether the interference was "prescribed by law," had a legitimate aim under Article 10(2), and was "necessary in a democratic society" for the advancement of that aim.[54] In *Lingens*, the ECtHR first determined that Austria's application of post-publication sanctions was an "interference" under Article 10(1) that was not justified under the standards of Article 10(2).[55]

The sources-of-law question before the Russian courts since the early 1990s presented a cluster of these considerations. In particular, following Russia's accession to the ECHR in 1998, the issues centered on the choice between the autonomy and plurality principles and the legal effect of ECtHR interpretations of ECHR Article 10.[56]

IV. THE SOURCES OF RUSSIAN CIVIL DEFAMATION LAW: FROM LEGISLATIVE TO PLURALISM

A. The Legislative Base

Building on elements from Soviet law and adding the powerful remedy of monetary compensation for non-economic harms (moral damages), Russian lawmakers in the first half of the 1990s constructed a statutory private law structure for protection of individual reputation and other

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53. This question usually will first be examined in the ECtHR's admissibility determination. One of the substantive grounds for the Court's denial of admissibility is a determination that an application is "manifestly ill-founded." ECHR, *supra* note 3, art. 35, ¶ 3.

54. *See* Lingens, 103 Eur. Ct. H.R. at para. 35.

55. That determination in fact was made in the December 11, 1981 admissibility decision of the European Commission (the ECtHR's former screening institution). Lingens v. Austria, 4 EHRR 373 (1982). At the Court, Austria did not dispute the existence of an interference. Lingens, 103 Eur. Ct. H.R. at para. 35.

Because Lingens involved a criminal prosecution and conviction, a question could be raised about whether a private plaintiff's civil law action for defamation also constitutes an act of "public authority." This is the *drittwirkung* (third-party effect) issue addressed in MARKENSIS & UNBERATH, *supra* note 49 (discussing the *Luth* decision) and *New York Times v. Sullivan*, 376 U.S. 254 (1964), and which both the German Federal Constitutional Court and the U.S. Supreme Court resolved by concluding that the acts of law-creation and adjudication by state organs represent "public" or "state" action sufficient to implicate the constitutional protections. In subsequent decisions involving civil law defamation, the ECtHR has indicated that it takes the same approach. *See, e.g.*, Tolstoy Miloslavsky v. United Kingdom, 316 Eur. Ct. H.R. 51 (1995).

56. *See* discussion *infra* Parts IV.B, V & V.I.A.

personality rights[57] that remains largely unchanged in 2006. This legislative base identifies the protected interests, establishes the circumstances under which those interests might legally be harmed, identifies defenses, and prescribes remedies. It contains what the SC until 2005 viewed as the exclusive, self-contained, comprehensive system of rules for resolution of personality rights disputes.[58] Indeed, until certain lower court decisions in 2002,[59] the proponents of the Civil Code system successfully withstood all efforts to introduce the plurality principle into civil defamation law.[60]

1. The Civil Code

The legislative base is set forth in the 1995 Civil Code of the Russian Federation,[61] Articles 150–152,[62] supplemented by Articles 1099–1101.[63]

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57. Krug (pt. 1), *supra* note 23, at 848–49. An action for civil defamation first was recognized in 1964. The remedies were limited to retraction and right reply until the addition of monetary compensation in the early 1990s.

58. *See, e.g.*, Viktor Knyshev, J., *Voprosy zashchity chesti i dostoinstva v praktike Verhkovnogo Suda RF [Questions of Protection of Honor and Dignity in the Practice of the Supreme Court of the Russian Federation]*, ZAKONODATEL'STVO I PRAKTIKA SREDSTV MASSOVOI INFORMATSII [LAW AND PRACTICE OF THE MASS INFORMATION MEDIA], Dec. 1997, *available at* http://www.medialaw.ru/publications/zip/40/questions.html.

59. *See* discussion *infra* notes 109–14 and accompanying text.

60. *See* discussion *infra* notes 105–08 and accompanying text. *See also* Krug (pt. 1), *supra* note 23, at 873–76; Krug (pt. 2), *supra* note 23, at 299–301.

61. The Civil Code consists of three "Parts." Part I (Articles 1–453) was signed by President Yeltsin on November 30, 1994, and entered into force on January 1, 1995. Grazhdanskii Kodeks RF (Chast' pervaia) [GK] [Civil Code (Part One)] No. 51-FZ. Part II (Articles 454-1109) was signed by President Yeltsin on January 26, 1996, and entered into force on March 1, 1996. Grazhdanskii Kodeks RF (Chast' vtoraia) [Civil Code of the Russian Federation (Part Two)] No. 14-FZ. Part III (Articles 1110–1224) was signed by President Putin on November 26, 2001, and entered into force on March 1, 2002. Grazhdanskii Kodeks RF (Chast' tret'ia) [Civil Code (Part Three)] No. 146-FZ. For a detailed discussion of these steps, see GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [CIVIL CODE OF THE RUSSIAN FEDERATION] 10–11 (Peter M. Maggs & Alexei N. Zhitsov eds. & trans., 2003). All English translations of the Civil Code provisions discussed in this article are taken from this source. In this article, I will refer to the entire Civil Code as the 1995 Civil Code (as amended).

Prior to 1995, civil defamation provisions were found in two primary sources—the 1964 RSFSR Civil Code (as amended) and *Osnovy [Foundations]* of the USSR (the most recent of which were enacted in 1991: *1991 Fundamentals of Civil Legislation of the USSR*, No. 2211-1, Vedomosti S"ezda Narodnykh Deputatov SSSR i Verkhovnogo Soveta SSR (Bulletin of the Congress of People's Deputies of the USSR and Supreme Council of the USSR, [Ved. SSSR] 1991, No. 26, Item 733)—supplemented beginning in 1990 with provisions in mass media legislation (the 1990 USSR Law on the Press, supplanted in 1991 by the Mass Media Law).

Article 150 (Nonmaterial Values) identifies a number of protected legal interests, including honor and good name, business reputation, dignity of personality, and inviolability of private life.[64]

a. Civil Defamation—Protection of Reputation Against False Defamatory Communications

Of the various legal interests identified in Article 150, only reputation receives detailed codification in the Civil Code.[65] Article 152 (Protection of Honor, Dignity, and Business Reputation) is devoted solely to protection of reputational interests: individual honor and business reputation.[66] Under Article 152(1), as construed by the Supreme Court, a successful civil defamation claim has three elements: (1) dissemination of a communication (*svedenie*[67]) concerning the plaintiff; (2) that is defamatory (*porochashchie*); and (3) is false.[68] Falsity is presumed, subject to the defendant's proof that the communication was true.[69] Liability is strict, not fault-based.[70]

Article 152 identifies the remedies (all post-publication) available to victims of false defamatory communications. These include retraction,[71] a right of reply if the defendant is a mass media outlet,[72] and monetary

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62. Articles 150–52 comprise Chapter Eight of the Civil Code ("Nonmaterial Values and Their Protection").

63. Articles 1099–1101 comprise Section Four ("Compensation for Moral Harm") of Chapter 59 ("Obligations as a Result of the Causing of Harm") of the Civil Code.

64. Grazhdanskii Kodeks RF [GK] [Civil Code] art. 150(1).

65. *Id.* art. 152.

66. Of these interests, the former is expressly recognized as a fundamental right in the Constitution (Article 23). The latter is not mentioned in the constitutional text. *Id.* art. 23.

67. The Russian text of Article 152(1) uses the word *svedeniia*, which is the plural form of *svedenie*. Grazhdanskii Kodeks RF [GK] [Civil Code] art. 152.

68. *Id.* art. 152(1); 2005 Explanation, *supra* note 2, § 7. *See also* Dmitrii Golovanov & Sergei Potapenko, Commentary, *Primenenie rossiiskimi sudami polozhenii Konventsii o zashchite prav cheloveka i osnovnykh svobod i praktiki Evropeiskogo suda po pravam cheloveka: teoreticheskie i prakticheskie aspekty* [*Application by the Russian courts of European Human Rights Convention provisions: theoretical and practical aspects*], ZAKONODATEL'STVO I PRAKTIKA MASS-MEDIA [LAW AND PRACTICE IN MASS MEDIA], Mar. 2005, *available at* http://www.medialaw.ru/publications/zip/127/4.htm [hereinafter Golovanov & Potapenko 2005]. *See also* Potapenko 2005, *supra* note 39, at 6.

69. Grazhdanskii Kodeks RF [GK] [Civil Code] art. 152(1).

70. Krug (pt. 1), *supra* note 23, at 856–57. Article 1100 of the Civil Code also states that the imposition of moral damages in defamation cases shall not be based on fault of the defendant. Grazhdanskii Kodeks RF [GK] [Civil Code] art. 1100. *See also infra* note 77 and accompanying text.

71. Grazhdanskii Kodeks RF [GK] [Civil Code] art. 152(1).

72. *Id.* art. 152(3).

compensation for economic and non-economic harm.[73] The non-monetary remedies have been retained from Soviet legislation enacted in 1964,[74] while monetary compensation was introduced into the legislative base in the early 1990s in a move that increased significantly the number of civil defamation lawsuits.[75]

Articles 151 and 1100–1101 address the remedy of compensation for non-economic harm (moral damages). "Moral harm" is defined as "physical or mental suffering" experienced as a result of violation of one of the Article 150 legal interests.[76] Moral damages are available for harm to honor, dignity, and business reputation "regardless of the fault of the one who caused the harm."[77] The court determines the amount of moral damages, basing its decision on factors such as the degree of the victim's physical and mental suffering and the guilty party's degree of fault.[78] In addition, the Civil Code requires that the court consider "the requirements of reasonableness and justice" in determining the amount of moral damages compensation.[79]

b. Related Personality Rights Claims: Civil Insult and Invasion of Privacy

Often intermingled with adjudication of civil defamation claims is judicial consideration of claims based on insult and/or violation of privacy. The courts recognize these as claims separate from civil defamation.[80] The Civil Code does not identify the claims' elements.[81] Instead, the courts have grafted them from the Criminal Code of the Russian Federation.[82]

The claim of "insult" (*oskorblenie*) is viewed as civil protection of the interest of individual dignity. Because it is not expressly addressed in the

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73. *Id.* art. 152(5). Articles 15, 1064, and 1082 of the Civil Code are applicable to harms to business reputation that are eligible for compensation as economic (not moral harm) losses (*ubytki*). *See* BURNHAM ET AL., *supra* note 14, at 370–74.

74. *See* Krug (pt. 1), *supra* note 23, at 867–73.

75. *See* discussion *supra* note 57 and accompanying text. *See also* Krug, *Harm to Business Reputation*, *supra* note 26. For a broader discussion about the remedy of compensation for "moral harm" generally in Russian law, see BURNHAM ET AL., *supra* note 14, at 372–73.

76. Grazhdanskii Kodeks RF [GK] [Civil Code] art. 151 ("Compensation for Moral Harm").

77. *Id.* art. 1100 ("Bases for Compensation for Moral Harm").

78. *Id.* arts. 151, 1101(2) ("Method and Amount of Compensation for Moral Harm").

79. *Id.* art. 1101(2).

80. BURNHAM ET AL., *supra* note 14, at 571–72.

81. *See* Grazhdanskii Kodeks RF [GK] [Civil Code] arts. 150–52.

82. BURNHAM ET AL., *supra* note 14, at 571–72.

Civil Code, the courts use the definition of "insult" found in Article 130 of the Criminal Code of the Russian Federation, which states in relevant part that insult is "the demeaning of the honor and dignity of another person, expressed in an indecent form."[83] Thus, it should be noted that truth is not a defense to this claim.

The elements of invasion of privacy (*narushenie neprikosnovennosti chastnoi zhizni*) are taken from Article 137 of the Criminal Code. In relevant part, Article 137 defines this violation as:

> the illegal gathering or dissemination of information about the personal life of a person without that person's permission which information constitutes a personal or family confidence, or the dissemination of such information . . . by means of the mass media, if such actions are undertaken for reasons of financial gain or personal benefit and cause harm to the rights and legal interests of citizens.[84]

2. The Law on Mass Information Media

The 1992 Law on Mass Information Media (Mass Media Law)[85] is another component of the legislative base. It provides certain exceptions from liability for journalists and media entities in Article 57.[86] It also sets forth rules for non-monetary remedies that basically amplify the refutation remedy in Article 152 of the Civil Code. Noteworthy here is the provision, in Article 46, that recognizes a right of reply for someone identi-

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83. Ugolovnyi Kodeks Rossiiskoi Federatsii [Criminal Code of the Russian Federation], Federal Law 63-FZ, Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1996, No. 25, Item 2954 (effective Jan. 1, 1997, as amended through Jan. 5, 2006), *available at* http://www.systema.ru/development/inc/bdoc.asp?Id=58568 (English translation from 39 STATUTES AND DECISIONS, No. 4 (July–August 2003), 102). *See* BURNHAM ET AL., *supra* note 14, at 571.

84. Ugolovnyi Kodeks RF [UK] [Criminal Code] art. 137, *translated in* BURNHAM ET AL., *supra* note 14, at 571.

85. Zakon o sredstvakh massovoi informatsii [Law on Mass Information Media], Vedomosti S"ezda Narodnykh Deputatov Rossiiskoi Federatsii i Verkhovnogo Soveta Rossiiskoi Federatsii [Ved. RF] [Bulletin of the Congress of People's Deputies of the Russian Federation and Supreme Council of the Russian Federation] 1992, No. 7, Item 300 [hereinafter *Mass Media Law*] [last amended July 21, 2005 (No. 93-FZ)], *available at* http://www.medialaw.ru/laws/russian_laws/txt/2.htm (English language version (up to and including amendments of December 8, 2003) *available at* http://www.medialaw.ru/e_pages/laws/russian/massmedia_eng/massmedia_eng.html).

86. Article 57 sets forth six circumstances in which journalists and media entities will be immune from liability for dissemination of defamatory information. For example, these circumstances include the dissemination of information from reports whose public distribution was required by law, the dissemination of information received from news agencies, and the literal reproduction of statements made by deputies during sessions of the federal legislature and statements of office holders of state institutions. *Id.* art. 57.

identified in a factually correct defamatory statement. It also reiterates the Civil Code's moral damages remedy in cases of violations of personality rights by journalists and media entities.[87]

3. Supreme Court Interpretations: The 1992 and 2005 Explanations

Of great importance for the practice of the ordinary courts are the SC's Explanations that interpret the legislative base. From its promulgation to its replacement in February 2005, the 1992 Explanation served as a leading source for the ordinary courts in their adjudication of defamation disputes.[88] The Explanations among other things seek to eliminate judicial uncertainty as to the meaning of indeterminate or ambiguous legislative texts. For example, both the 1992 and 2005 Explanations defined the term "defamatory meaning" as found, but not defined, in Article 152 of the Civil Code.[89]

In sum, the legislative base reflects the legislature's policy determinations as to the proper balance between reputational and free expression interests.[90] The defamation law system established in the early 1990s reflected the aspirations and success of personality rights advocates, who viewed it as a long-awaited vehicle of effective recourse for individuals targeted in public fora for ridicule and humiliation, particularly by more powerful media entities.[91] This structure was consciously weighted heavily in favor of plaintiffs and quickly became a popular form of legal action.[92] In addition to providing strict liability, placing the burden on de-

87. *Id.* art. 46.

88. 1992 Explanation, *supra* note 34, art. 62.

89. *Id.* § 2; 2005 Explanation, *supra* note 2, § 7. The latter slightly revised the 1992 Explanation's definition. Regarding the 1992 Explanation's definition, see Krug (pt. 1), *supra* note 23, at 854.

90. Potapenko 2005, *supra* note 39, at 4.

91. *See* Krug (pt. 1), *supra* note 23, at 863–76.

92. *Id.* at 848–51. Some recent statistics are provided in a 2005 report by the Representative on Freedom of the Media for the Organization for Security and Co-operation in Europe (OSCE). The report states:

> According to data from the governmental statistical reporting for 2002, 7,464 court judgements were issued on civil cases connected with the protection of honour, dignity and business reputation, for 2003, 6,498 and for the first six months of 2004, 3,320 such judgements were issued.

ORG. FOR SECURITY AND CO-OPERATION IN EUROPE, LIBEL AND INSULT LAWS: A MATRIX ON WHERE WE STAND AND WHAT WE WOULD LIKE TO ACHIEVE 130 (2005), *available at* http://www.osce.org/fom/documents.html.

A recent detailed study of defamation actions in one province—Arkhangel'sk—is found in N.A. Pushkarev, J., *Obobshchenie po rezul'tatam izucheniia sudebnoi praktiki po delam o zashchite chesti i dostoinstva grazhdan, a takzhe delovoi reputatsii grazhdan i*

fendants to prove the truth of impugned communications, and giving broad judicial discretion as to the amount of damages, it also provided a broad construction of "communication" and "defamatory meaning" to include not only assertions of fact but also statements of opinion.

B. External Norms, Particularly the ECHR

Because of the new directions that began in 2002 and culminated in the SC's 2005 Explanation, it now is accepted that civil defamation law is grounded in the plurality principle, with multiple active sources of law: the legislative base, Article 29 of the 1993 Constitution of the Russian Federation, and Article 10 of the ECHR. The steps in this process involved recognition of the applicability of the ECHR as an active external source of law in both scattered lower court decisions and SC Explanations generally applicable to the entire ordinary court system.

Even before 2002, the pre-conditions for applicability of external norms in civil defamation existed. Article 29 of the 1993 Russian Constitution includes express guarantees for freedom of speech and the press.[93] In addition, throughout the period in question, Russia was a party to the International Covenant on Civil and Political Rights (ICCPR), which

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iuridicheskikh lits za period 2002-2004 gody (izvlechenie) [*General conclusions on the results of a study for the period 2002-2004 of judicial practice in cases concerning protection of honor and dignity of citizens and business reputation of citizens and legal persons (excerpts)*], Aug. 23, 2004 [hereinafter Arkhangel'sk Report], http://www.arhcourt.ru/?Documents/Civ/Gen/200417170003. The report stated that courts in the province heard 336 civil defamation cases in the thirty-month period starting on January 1, 2002.

93. Article 29 states in full:

> 1. Everyone shall be guaranteed freedom of thought and speech.
>
> 2. Propaganda or agitation inciting social, racial, national or religious hatred or enmity shall not be allowed.
>
> The propaganda of social, racial, national, religious or language superiority shall be prohibited.
>
> 3. No one may be forced to express his or her opinions and convictions or to renounce them.
>
> 4. Everyone shall have the right to freely seek, receive, transmit, produce and disseminate information in any lawful way. The list of data that constitute state secrets shall be established by federal statute.
>
> 5. Freedom of the mass media shall be guaranteed. Censorship shall be prohibited.

Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 29, *translated in* BURNHAM ET AL., *supra* note 14, at 643.

includes free expression guarantees in its Article 19.[94] Finally, and most central to this Article, in 1998 Russia acceded to the ECHR.[95] Article 10 (Freedom of Expression) of the ECHR states in full:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[96]

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94. International Covenant on Civil and Political Rights art. 19, Dec. 19, 1966, 999 U.N.T.S. 171 [ICCPR] (adopted by the U.N. General Assembly on December 16, 1966; entered into force on March 23, 1976). The USSR ratified the ICCPR on March 23, 1976, and Russia is the successor state to the USSR. ICCPR Article 19 states in full:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

95. *Federal'nyi zakon "O ratifikatsii Konventsii o zashchite prav cheloveka i osnovnykh svobod i Protokolov k nei* [*Federal Law "On the ratification of the Convention on Protection of Human Rights and Fundamental Freedoms and its Protocols"*] Federal Law No. 54-FZ, Sobranie Zakonadatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1998, No. 14, Item 1514 [hereinafter ECHR Accession Act].

96. ECHR, *supra* note 3, art. 10.

Articles 29, 19, and 10 also were accessible.[97] Under Articles 15(1) and 15(4) of the Constitution, both constitutional and international treaty norms are directly applicable in the legal system and in fact are superior to conflicting legislation.[98] Article 18 provides that human rights protections operate with direct effect—that is, individuals have standing to invoke them in the courts.[99] In addition, actors in the legal system must recognize and guarantee the human rights and freedoms enumerated in

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97. For discussion of accessibility and applicability, see *supra* notes 47–48.

98. Article 15(1) states in full:

> The Constitution of the Russian Federation shall have supreme legal force and direct effect, and shall be applicable throughout the entire territory of the Russian Federation. Laws and any other legal acts adopted within the Russian Federation may not contravene the Constitution of the Russian Federation.

Article 15(4) states in full:

> Generally recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute an integral part of its legal system. If an international treaty of the Russian Federation establishes rules other than those provided for by the law, the rules of the international treaty shall apply.

Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] arts. 15(1), 15(4) *translated in* BURNHAM ET AL., *supra* note 14, at 640. For a detailed discussion of Article 15(4), see Danilenko, *New Russian Constitution*, *supra* note 6, at 464–66, and Danilenko, *Implementation of International Law*, *supra* note 6, at 57–58, 68. According to one commentator, Justice Vereshchetin of the ICJ, Article 15(4) reflected the adoption of a "radically new principle" in Russian law. In contrast, he noted: "The former Constitutions of the Soviet Union and of Russia never contained general principles on the relationship between international law and internal law." Vladlen S. Vereschchetin, *New Constitutions and the Old Problem of the Relationship Between International Law and National Law*, 7 EUR. J. INT'L L. 1, 9 (1996), *available at* http://www.ejil.org/journal/Vol7/No1/art2.pdf.

The Civil Code, *supra* note 61, itself allows for this in regard to the relationship between its provisions and international treaty norms. The second paragraph of Article 7(2) states in full: "If an international treaty of the Russian Federation establishes rules other than those that are provided by civil legislation, the rules of the international treaty are applied." However, to this author's knowledge, Article 7(2) never has been invoked, at least successfully, by a defendant in a defamation case.

99. Article 18 states in full:

> The rights and freedoms of the individual and citizen shall have direct effect. They shall determine the meaning, content and application of the laws, the activities of the legislative and executive branches and local self-government and shall be enforced by the judiciary.

Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 18, *translated in* BURNHAM ET AL., *supra* note 14, at 641.

the Constitution in conformity with "generally recognized principles and norms of international law and in accordance with this Constitution."[100]

In an affirmation of the availability of external norms and their accessibility, the SC in 1995 directed the ordinary courts to use external norms as active sources of law when applicable, and to refrain from applying legislative acts that conflict with those norms.[101] In other words, the SC directed the courts to act as constitutional control bodies within the limits of their competency.

In defamation law, however, the external norms were passive: the ordinary courts did not recognize their applicability to disputes in which the Civil Code's protections of individual reputation and other personality rights were invoked. Thus, in the 1990s, the SC ignored or rejected efforts to make Article 29 active.[102] Challenges to the private law structure, at least to some of its specific elements, began in the mid-1990s.[103] These challenges were of two types, often expressed concurrently: a plurality principle argument, grounded in the free expression guarantees in Article 29 of the Constitution and directed toward invalidation of the Civil Code's defamation scheme,[104] and the use of narrow statutory con-

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100. *Id.* art. 17(1), *translated in* BURNHAM ET AL., *supra* note 14, at 640–41.

101. Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 1996, No. 1, p. 3, *available at* http://www.supcourt.ru/vscourt_detale.php?id=3863 (Postanovlenie No. 8 Plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 31 oktiabria 1995 g. "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia" [Decree No. 8 of the Plenum of the Russian Federation Supreme Court dated October 31, 1995 "Concerning Several Questions on the Courts' Application of the Russian Federation Constitution in the Administration of Justice"]) [hereinafter 1995 Explanation]. *See also* Krug, *Departure*, *supra* note 14, at 754–56.

102. Krug (pt.2), *supra* note 23, at 333–34; Krug, *Departure*, *supra* note 14, at 778; Peter Krug, *Press Freedom in Russia: Does the Constitution Matter?*, *in* RUSSIA AND ITS CONSTITUTION: PROMISE AND POLITICAL REALITY, (Gordon B. Smith & Robert Sharlet eds., forthcoming 2007) [hereinafter Krug, *Press Freedom in Russia*].

103. Krug (pt.2), *supra* note 23, at 303–07.

104. A particularly illustrative expression of frustration with the autonomy principle came in a commentator's 1994 observation that a Moscow appellate court had been literally correct in its decision in favor of a defamation plaintiff, but at the same time had lacked "the least particle of civil responsibility." *See* Krug (pt. 2), *supra* note 23, at 300 (lawyer and human rights activist Kronid Lyubarsky, commenting on the outcome in *Zhirinovskii v. Gaidar*, in which defendants former Prime Minister Egor Gaidar and the newspaper Izvestiia were found guilty of defamation for publication of statements that the plaintiff, State Duma Deputy Vladimir Zhirinovskii, was "a fascist populist" and "the most popular fascist in Russia"—statements that the defendants unsuccessfully had argued were expressions of opinion not susceptible to liability).

structions of the Civil Code to make it consistent with Article 29.[105] A particular target of both was the practice of the Russian courts in treating similarly *all* communications—assertions of fact and statements of opinion—thereby rejecting recognition of a distinction, with different legal effects, between them.[106]

However, the SC did not deviate from the autonomy principle in either its interpretive or adjudicative capacities. The 1992 Explanation, amended in 1993 and 1995 and in effect until adoption of the 2005 Explanation, adhered strictly to legislative and private law autonomy. The Explanation did not make any references to free expression interests or cite to any external norms in its interpretive analysis of the applicable legislation.[107] As to adjudication, in its only published adjudication of a concrete defamation case, the SC, in 1997, expressly rejected adoption of the plurality concept.[108]

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105. *See, e.g.*, A. Erdelevskii, *Utzverzhdenie o fakte I vyrazhenie mneniia—poniatiia raznogo roda (Assertions of fact and expression of an opinion—two different concepts)*, ROSSIISKAIA IUSTITSIIA, June 1997, at 17; S. Potapenko, *Fakty I mneniia v delakh o zaschite chesti (Facts and opinions in the protection of reputation disputes)*, ROSSIISKAIA IUSTITSIIA, July 2001, at 28, 29 [hereinafter Potapenko, *Facts and Opinions*].

106. *See, e.g.*, A. Erdelevskii, *supra* note 105, at 47; S. Potapenko, *Facts and Opinions*, *supra* note 105, at 28; S.V. Potapenko, *Lichnoe mnenie kak privilegiia ot iska o diffimatsii v SMI [Personal opinion as a privilege against complaints about defamation in the mass media]*, ZH.R.P., May 2002, at 72.

The fact/opinion question has been a significant component in the defamation jurisprudence of the German Federal Constitutional Court. *See* SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 200–06 (1999). *See also* MARKESINIS & UNBERATH, *supra* note 49, at 380.

107. 1992 Explanation, *supra* note 34. The 1995 amendments, which came after the 1993 Constitution and its provision for direct applicability and direct effect of constitutional and international norms, still adhered to the prior autonomy principles. In keeping the 1992 Explanation intact, the SC declined to accept invitations to adopt the plurality principle from either the CC or a conference of ordinary court judges and journalists. Regarding the former, issued in the CC's 1995 Kozyrev determination, *supra* note 29, see Potapenko 2005, *supra* note 39, at 4, and Krug (pt. 2), *supra* note 23, at 303–07. The latter appeal was made in 1999 by a conference of judges and journalists in Krasnodar Krai. *See* Iurii Luchinskii, *Konferentsiia sudei i zhurnalistov [Conference of judges and journalists]*, ZAKONODATEL'STVO I PRAKTIKA SREDSTV MASSOVOI INFORMATSII [LAW AND PRACTICE OF THE MASS INFORMATION MEDIA], May 1999, http://www.medialaw.ru/publications/zip/regional/krasnodar/krasnodar1.html#4. To some extent, it may be said that the SC's 2005 Explanation is in effect a response to the questions raised in those appeals.

108. In the SC's 1997 decision, the Vologda Provincial Court Civil Chamber and Presidium had applied the free expression protections of Article 29 of the Constitution to dismiss a defamation lawsuit. But see the SC's application of plurality in a decision involving a provincial insult law: the 2003 *Shusterman* decision, *supra* note 37. On supervisory review, the Supreme Court's Civil Chamber reversed these decisions on the

1. Foundations for New Directions: The 2002 *Karelia* Decision and Other Lower Court Practice

Despite the apparent solidarity of the private law structure, a 2002 district court decision in the Republic of Karelia signaled the beginning of the movement toward plurality.[109] The court dismissed a civil defamation complaint brought by two republican legislative deputies against two local newspapers and two individuals.[110] Citing what it called the "precedential law" of the ECtHR as expressed in *Lingens v. Austria*,[111] the court concluded that the communications in question, critical of the plaintiffs, were value judgments and therefore lacked a defamatory meaning.[112]

This decision's implicit adoption of the plurality principle was noteworthy in itself. However, the succession of the steps that the court took to reach its judgment was also significant.[113] These steps were:

1. The court's recognition of the availability and accessibility of the ECHR. However, in itself, a reading of the Article 10 text would not necessarily have resulted in dismissal of the suit, since the text does not address the specific questions presented. Indeed, if anything, a reasonable reading of the text could yield a conclusion that the inclusion of "protection of reputation" among the Article 10(2) exceptions would

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grounds that false defamatory statements fall outside the zone of Article 29 protection. *See* Krug, *Departure*, *supra* note 14, at 778.

109. Karelia decision, Mar. 12, 2002, *available at* http://www.medialaw.ru/article10/7/2/08.htm. The Republic of Karelia is one of the eighty-nine Subjects of the Russian Federation. The Karelia decision is among a collection of lower court judgments in defamation cases posted at the website of the Moscow Media Law and Policy Institute, http://www.medialaw.ru/article10/7/index.htm. To this author's knowledge, the decisions have not otherwise been published. Hereinafter, citations to cases found in this collection will be to the name of the Province in which they were rendered, and the date of the judgment.

Although cracks began to appear in the autonomy principle structure in 2002, and a significant departure occurred in 2005 with the SC's 2005 Explanation, manifestations of the autonomy principle remain, particularly in the practice of the *Arbitrazh* courts. A recent, highly visible illustration of such exclusion of external law is found in the multiple decisions of the *Arbitrazh* courts in the *Al'fa Bank v. Kommersant* litigation, *supra* note 26. The four court decisions in that case do not include recognition of the applicability (or potential applicability) of external norms. The defendant Kommersant in September 2005 filed an application at the ECtHR, claiming violation of rights guaranteed under the ECHR, including Article 10. The ECtHR has not made an admissibility decision regarding the application at the time of this writing. *Id.*

110. Karelia decision, *supra* note 109.

111. Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A) at 11 (1986).

112. *Id.*

113. The judgment did not state most of these explicitly, but the logical progression is evident from its text.

have excluded the application of the free expression provisions of Article 10(1).[114]

2. The court's recognition of the relevance, in some sense, of ECtHR practice interpreting Article 10. In doing this, the *Karelia* decision appears to have been the first in the Russian courts to refer to ECtHR interpretations as a category for authoritative guidance on Article 10.

3. The court's recognition of Article 10's applicability, based on the ECtHR's recognition of an "interference" in an analogous case (*Lingens v. Austria*) involving subsequent punishment for an unlawful communication.

4. Having adopted the plurality principle, the *Karelia* court again identified the ECtHR's position, articulated in *Lingens*, that the fact/opinion distinction has legal consequences.

5. Having concluded that the ECtHR's *Lingens* position was applicable, the *Karelia* court did not apply Article 10 to declare application of Article 152 of the Civil Code unconstitutional or to refer the question of Article 152's constitutionality to the CC.[115] Instead, the court engaged in statutory construction to determine that a statement of opinion cannot have a "defamatory meaning" under Article 152. In doing so, the court

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114. Indeed, the explicit inclusion of "protection of the reputation or rights of others" among the legitimate aims that might justify a state's imposition of restrictions on the exercise of expressive rights should serve as support for continued reliance on the legislative base as the sole authority in adjudication of reputation disputes. Certainly, the Article 10 text does not provide any more protection for expressive interests than does the combination of Articles 29 and 55(3) of the Russian Constitution. Article 29 is set forth *supra* note 93. Article 55(3) states in full:

> The rights and freedoms of the individual and citizen may be restricted by federal statute only to the extent necessary to protect the fundamentals of the constitutional system, morality, health, rights and lawful interests of other persons, or to ensure the defense of the country and the security of the state.

Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 53(3), *translated in* BURNHAM ET AL., *supra* note 14, at 648. For analysis of the CC's interpretation and application of Article 55(3), see Peter Krug, *Assessing Legislative Restrictions on Constitutional Rights: The Russian Constitutional Court and Article 55(3)*, 56 OKLA. L. REV. 677 (2003).

115. Article 101 of the CC Statute, *supra* note 28, provides for ordinary court referral to the CC upon the ordinary court's conclusion that a legislative normative act normally applicable in a concrete dispute is inconsistent with the Constitution. For a discussion about the referral mechanism, including the controversy over whether it is mandatory or discretionary, see BURNHAM ET AL., *supra* note 14, at 98–102, and Krug, *Departure*, *supra* note 14, at 746–50.

arguably went beyond the dictates of the SC's definition of "defamatory meaning" in its 1992 Explanation.[116]

Central to the *Karelia* court's approach, and also similar to subsequent lower court adjudicatory decisions, was recognition of the weight to be afforded to ECtHR interpretations of the ECHR. Thus began the gradual movement toward internalization of the ECtHR's practice, which proceeded hand in hand with growing recognition of the plurality principle in defamation law.

2. Internalization and the Plurality Principle as Uniform Mandates: Supreme Court Explanations and the "Take into Account" Directive

a. The October 10, 2003 Explanation

The approaches of the lower courts in the early sporadic decisions were not uniform: some appear to have been internalizing ECtHR practice and adopting the plurality principle out of a sense of legal mandate,[117] while others apparently were doing so as a matter of discretion, treating the ECtHR's interpretation of the binding Article 10 as persuasive authority. In generally applicable Explanations starting in October 2003, the Supreme Court began the process of establishing uniformity of practice in this area.[118]

The October 10, 2003 Explanation addressed the internalization question as a general matter, without reference to Article 10 or defamation disputes.[119] Having first established that international agreements, including the ECHR, to which Russia is a party, are binding in the Russian legal system, the Explanation informed the lower courts that, in all cases

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116. 1992 Explanation, *supra* note 34. In section 2, paragraph 2, the 1992 Explanation stated in full:

> False communications which are defamatory are those which contain assertions about the violation by a citizen or organization of applicable legislation or moral principles (about commission of dishonorable acts, incorrect behavior in the workplace or in private life, or other statements discrediting productive economic or social activity, reputation, and so on), diminishing their honor and dignity.

Id. § 2, para. 2. For further discussion, see Krug (pt. 1), *supra* note 23, at 854.

117. The use of the term "precedential law" in the *Karelia* decision suggests that the court considered itself bound to apply the ECtHR interpretation in question. *See* Karelia decision, *supra* note 109.

118. The 1995 Explanation, *supra* note 101, did not address judicial interpretations of treaty norms and of course was promulgated before Russia's 1998 accession to the ECHR.

119. October 10, 2003 Explanation, *supra* note 35.

where the ECHR is applicable, they must "take into account" the ECtHR's "practice" in order "to avoid violations of the ECHR."[120]

b. The 2005 Explanation

Although the October 10, 2003 Explanation broadly called upon the courts to take into account the ECtHR's practice, it did not explicitly cite Article 10 and therefore did not in itself resolve the specific question of whether, as a generally applicable rule, defamation disputes should be subject to the plurality principle.[121] Meanwhile, in 2004, a growing number of courts continued to apply the plurality principle.[122]

On December 23, 2004, the Supreme Court Plenum, with representatives of government agencies and other courts in attendance and participating, along with representatives of NGOs and journalists' organiza-

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120. *Id.* §§ 10, paras. 2–3; 11, para. 2. In some places, the Court uses the verb *uchityvat'* (*see* § 10, para. 2)—in others, the phrase "*osuchshestvliat'sia s uchetom*" (*see* § 10, para. 3). Both may be rendered as "take into account." For detailed discussion as to the meaning of this "take into account" requirement, see *infra* Part VI.A.

In another illustration of the growing importance of the ECtHR's practice, the SC in a December 19, 2003 Explanation directed the lower courts, as part of their requirement under the Civil Procedure Code, to set forth a statement of reasons in their judgments, and to make citations to specific ECtHR decisions whenever they were making use of ECtHR interpretations. Biulleten' Verkovnogo Suda RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 2004, No. 2, p. 3, § 4, *available at* http://www.supcourt.ru/vscourt_detale.php?id=1419 (Postanovlenie N. 23 Plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 19 dekabria 2003 g. "O sudebnom reshenii" [Decree No. 23 of the Plenum of the Russian Federation Supreme Court "Concerning the Judicial Decision"]) [hereinafter December 19, 2003 Explanation]. A noteworthy aspect of this judicial gloss on Article 198 of the Civil Code (which does not mention the ECtHR) is that section 4 included the ECtHR among the three courts for whom it must provide such citations, the other two being the SC itself and the CC. In other words, this leaves the implication that the ECtHR is to be viewed as another high court in the Russian legal system.

121. The plurality principle includes applicability of Article 29 of the Constitution, as well as ECHR Article 10. However, in the ordinary courts' practice and in the 2005 Explanation, the use and influence of Article 10 far exceed those of Article 29. This undoubtedly is attributable to the wide availability and prestigious influence of the ECtHR interpretive practice. *See* 2005 Explanation, *supra* note 2.

122. For example, at least two courts stated this expressly. In an October 14, 2004 decision, the Civil Chamber of the Sverdlovsk Provincial Court articulated recognition of the plurality of sources in civil defamation law. Sverdlovsk Civil Chamber Decision, No. 33-8056, *available at* http://www.femida.e-burg.ru/show_doc.php?id=3829. In a November 20, 2003 decision, a Sverdlovsk Province District Court set forth the plurality principle in detail, citing the applicable sources of law: norms of the ECHR; decisions of the ECtHR; the Constitution; decisions of the CC; the Civil Code (as interpreted by the SC); and the Mass Media Law. Sverdlovsk District Court Decision, *available at* http://www.medialaw.ru/article10/7/2/14.htm.

tions, met to consider the latest draft of an Explanation that would replace the 1992 Explanation and in doing so address the question of the active sources in defamation law.[123] The timing of the Plenum was noteworthy in light of increasing signals from Strasbourg that Russia's defamation scheme was undergoing growing scrutiny.[124] Two weeks earlier, the ECtHR had found four applications by defamation defendants against Russia admissible,[125] raising to seven the number of such applications

123. A number of speakers at the Plenum were judges from the regional higher courts and representatives from the Procuracy and government agencies, as well as representatives of journalists' professional organizations. The official report on the Plenum is found in Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 2005, No. 4, p. 1, *available at* http://www.supcourt.ru/vscourt_detale.php?id=2536 (Plenuma Verkovnogo Suda Rossiiskoi Federatsii ot 23 dekabria 2004 g. "O sexebnoi praktike po delam o zashchite chesti I dostoinstva grazhdan, a takzhe delovoi reputatsii grazhdan I iuridicheskikh lits" [Plenum of the Supreme Court of the Russian Federation from 23 December 2004 "Concerning Judicial Practice in Cases Concerning the Defense of Honor and Dignity and the Business Reputations of Citizens and Businesses"]) [hereinafter Plenum Report]. Reports from the press include: Mikhail Fedotov, *Supreme Court Opens Door to Better Rules*, THE MOSCOW TIMES, Mar. 2, 2005, at 10, *available at* http://www.themoscowtimes.com/stories/2005/03/02/006.html (access requires payment, on file with the *Brooklyn Journal of International Law*); Andrei Richter, *Chest' i dostoinstvo: shag k svobode slova* [*Honor and Dignity: A Step Toward Freedom of Speech*], VEDOMOSTI [GAZETTE], Mar. 5, 2005, *available at* http://www.vedomosti.ru/newspaper/article.shtml?2005/03/05/88980 (access requires payment, on file with the *Brooklyn Journal of International Law*) [hereinafter Richter, VEDOMOSTI]. *See also* Dmitrii Golovanov, Commentary, *Novaia redaktsiia Postanovleniia Plenuma Verkhovnogo Suda po delam o zashchite chestoi, dostoinstva i delovoi reputatsii: proryvy, udachi i nedorabotki* [*The New Edition of the Supreme Court Plenum's Decree on Cases Involving Protection of Honor, Dignity and Business Reputations: Break-throughs, Accomplishments and Shortcomings*], ZAKONODATEL'STVO I PRAKTIKA MASS-MEDIA [LAW AND PRACTICE IN MASS-MEDIA], Mar. 2005, http://www.medialaw.ru/publications/zip/127/3.htm [hereinafter Golovanov 2005]; Potapenko 2005, *supra* note 39; Tat'iana Smyslova, Commentary, *Kommentarii K Postanovleniiu Plenuma Verhkovnogo Suda RF N. 3 ot 24 fevralia 2005 g. "O sudebnoi praktike po delam o zashchite chesti i dostoinstva grazhdan, a takzhe delovoi reputatsii grazhdan i iuridicheskikh lits"* [*Commentary on the Decree of the Plenum of the Supreme Court of the Russian Federation No. 3 from 24 February 2005 "Concerning Court Practice in Cases Involving the Protection of Honor and Dignity of Citizens and the Business Reputations of Citizens and Businesses"*] (2005), http://www.gdf.ru/law/st-035.shtml.

124. Richter, VEDOMOSTI, *supra* note 123. The existence of a connection between these concerns and the ECtHR's reiteration of the "take into account" requirement and its "avoidance of violation" standard is plausible. *See* discussion *infra* notes 197–206 and accompanying text.

125. *See supra* note 9 (discussing the *Godlevskiy*, *Krasulya*, *Porubova*, and *Zakharov* applications).

found admissible in 2004.[126] The SC President, Judge V.M. Lebedev, supported the proposed Explanation, much of which had been drafted by Judge S.V. Potapenko, a member of the SC and a long-time advocate of the fact/opinion distinction and incorporation of Article 10.[127] Judge Potapenko served as the *rapporteur* (*dokladchik*) at the Plenum.[128] Also adding to the atmosphere were expressions of concern from lower ordinary courts seeking resolution of defamation law questions. For example, the detailed August 2004 study by Judge Pushkarev of Arkhangel'sk Province stated as one of its conclusions:

> In each concrete civil case, it is necessary to strive to make certain that the claim for protection of honor and good name does not run counter to freedom of speech in a democratic society. This must be the judge's responsibility in hearing and deciding disputes for protection of honor, dignity, and business reputation.[129]

To accomplish this, the report proposed that the courts continue to analyze the "unclear and controversial questions" that arise in reputational disputes.[130]

The result of the Plenum was approval of a new Explanation on questions of civil defamation law which, after final editing, was promulgated on February 24, 2005 (the 2005 Explanation).[131] The 2005 Explanation replaced the 1992 Explanation.[132] Its most fundamental departure from its predecessor was the express adoption of the plurality principle in civil defamation law.[133] In contrast to the 1992 Explanation's absence of references to sources of law outside the legislative base, the 2005 Explana-

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126. *See* Filatenko v. Russia, *supra* note 9; Dyuldin & Kislov v. Russia, *supra* note 9. In addition, the application in *Grinberg v. Russia*, decided on the merits on July 21, 2005, was found admissible on October 28, 2004. Grinberg v. Russia, App. No. 23472/03, Eur. Ct. H.R. (2005). It is also possible that the SC judges were aware of the draft of the critical report that PACE subsequently adopted on June 22, 2005. *See Honouring of Obligations, supra* note 7.

127. *See, e.g.*, Potapenko, *Facts and Opinions, supra* note 106.

128. *See* Plenum Report, *supra* note 123.

129. Arkhangel'sk Report, *supra* note 92.

130. *Id.*

131. *See* 2005 Explanation, *supra* note 2.

132. *Id.* § 19.

133. Some of the speakers at the December 23, 2004 Plenum expressly endorsed this step. For example, the Deputy President of the Moscow City Court, V.V. Gorshkov, welcomed the draft Explanation's incorporation of ECtHR Interpretations, listing specifically the free expression of statements of opinion, the essential role of the mass media in democratic society, the lifting of the burden on defendants to prove the truth of value judgments, and the duty of journalists to verify assertions of fact prior to publication. Plenum Report, *supra* note 123, at 2.

tion, in its Preamble, specifically cited the relevancy to defamation law of the freedom of speech and "mass information" guarantees in Article 29 of the Constitution and Article 10 of the ECHR,[134] and stated that Russia's accession to the ECHR gave rise to new questions in the courts' defamation practice.[135] In this regard, the SC reminded the courts to take into account earlier Explanations in which it addressed in general terms the domestic incorporation of international norms.[136] As a result, the SC instructed the courts in deciding defamation disputes to observe a balance between a citizen's right of reputation and the freedoms of speech and mass information.[137] In conjunction with its adoption of plurality, the Explanation also specifically mandated adherence to the SC's "take into account" requirement in the defamation law context, directing the courts to internalize ECtHR interpretations of Article 10 in their adjudication of defamation disputes.[138]

The Explanation is also noteworthy as the first SC pronouncement recognizing, although in somewhat sporadic fashion, the rights and role of the mass information media. In addition to the references cited in the above paragraph, the SC also included a rule regarding attention to concerns of the mass information media in section 15 of the Explanation.[139] In all, these references, as well as the general tenor of the Explanation, were warmly received by press freedom supporters.[140] From their point of view, these were threshold steps of considerable importance, representing the first significant judicial recognition in Russia of the incidental impact of generally applicable laws on the exercise of free speech and press freedoms.[141] While evidence of their active implementation must await future developments, their articulation alone stands in marked contrast to highly visible judicial decisions in recent years in which Russian courts did not voice recognition of such interests or take them into account.[142]

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134. 2005 Explanation, *supra* note 2, Preamble, paras. 1–2.

135. *Id.* Preamble, para. 5.

136. *Id.* § 1, para. 4 (citing 1995 Explanation, *supra* note 101, and October 10, 2003 Explanation, *supra* note 35).

137. *Id.* § 1, para. 3.

138. *Id.* § 1, para. 5.

139. *See infra* note 184 and accompanying text.

140. Fedotov, *supra* note 123; Richter, VEDOMOSTI *supra* note 123; Smyslova, *supra* note 123.

141. Fedotov, *supra* note 123; Richter, VEDOMOSTI *supra* note 123; Smyslova, *supra* note 123.

142. These include the *Al'fa Bank v. Kommersant* litigation, *supra* note 26, and the controversies over the broadcast licenses of the companies NTV and TV-6. The latter disputes included protracted litigation in the *Arbitrazh* courts, as well as a subsequent

Having adopted the multiplicity of sources in defamation law, along with the internalization of the ECtHR's practice interpreting Article 10, the SC's path was open to the re-shaping of specific aspects of that body of law—an exercise in which the lower courts had been pointing the way.

V. THE NEW DIRECTIONS: APPLICATION OF THE PLURALITY PRINCIPLE AND ECTHR INTERNALIZATION

The 2002 *Karelia* decision[143] was the forerunner of a number of lower ordinary court decisions in which the ECHR and the ECtHR interpretations were employed to fashion new approaches to defamation law.[144] A

Constitutional Court decision. Vestnik Vysshego Arbitrazhnogo Suda RF [Vestn. VAS] [The Highest Arbitration Court of the RF Reporter], *available at* http://arbitr.garant.ru/public/default.asp?no=1676453 (Postanovlenie Prezidiuma Vysshego Arbitrazhnogo Suda RF ot 11 ianvaria 2002 g. N. 32/02 [Decree of the Presidium of the Highest Arbitration Court RF from 11 January 2002 N. 32/03]; Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2003, No. 30, p. 7619, *available at* http://mirror2.garant.ru/webclient/navigation.dsp?topic=867137&realid=12031809&page=1#end. *See* Krug, *Press Freedom in Russia*, *supra* note 102.

143. *See supra* notes 109–15 and accompanying text.

144. For this article, I have examined eighteen lower court decisions that were chosen because of the detailed information available and the issues they presented. In most cases, the full judgments of the courts were examined. This list is not intended to be representative of lower court practice during the years in question. Among other things, I am not aware of any systematic compilation of lower court decisions. The cases examined for this article were located at the following websites: the Moscow Media Law and Policy Institute (MMLPC), *supra* note 109; the Central-Chernozem Center for Defense of the Rights of the Mass Information Media, http://www.mmdc.narod.ru/analytics/analytic_1.html; the *Sutiazhnik Obshchestvennoe Ob"edinenie* [Sutyajnik Public Association], http://www.sutyajnik.ru/rus/echr/school/dom_judg.html; the Sverdlovsk Oblast' court, http://www.femida.e-burg.ru; the Arkhangel'sk Oblast' court, http://www.arhcourt.ru/?Documents/Civ/Gen; the *Tsentr Extremal'noi Zhurnalistiki* [Center for Journalism in Extreme Situations], http://www.cjes.ru/index-e.php; and the *Fond Zashchiti Glasnosti* (Glasnost Defense Foundation), http://www.gdf.ru. Some of these provide reports and detailed summaries of court judgments, but others (particularly the MMLPC, but also the Central-Chernozem, Sutiazhnik, and Sverdlovsk oblast court websites) make available the judgments themselves—a useful resource for viewing "law in action" in Russia's provincial courts. These are mostly district court decisions, with a few appellate judgments by the regional [Subject] higher courts. Hereinafter, citations to cases found in these collections will be to the name of the Province in which they were rendered, and the date of the judgment.

Clearly, this research must be selective, not comprehensive. To my knowledge, there is not any systematic method of gathering information from all regional courts in the vast Russian system. Another limitation is that it is not possible in a systematic fash-

number of the cases presented fact patterns similar to *Karelia*: public officials, usually elected, suing local journalists and mass media outlets for reports that in many cases alleged corruption or mismanagement of public assets.[145]

A noteworthy element in many of these disputes is the apparent impact of defense lawyers, often affiliated with NGOs, utilizing the ECHR and ECtHR to bolster their arguments. Russia's accession to the ECHR placed a potentially useful tool in the hands of press freedom advocates as they sought, often successfully, to persuade courts to dismiss complaints in their entirety, dismiss specific claims in complaints while imposing liability in regard to others, or to award moral damages far below the amounts sought by plaintiffs.[146] Some of these cases provide vivid illustration of the decisive value and effectiveness of NGO advocacy.[147]

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ion to follow the outcome on further appeals in a number of the cases. In this regard, however, I have not found any cases that came under supervisory review at the SC.

145. For discussion of a number of these decisions, see *infra* Part VI.B. Of the eighteen decisions closely examined: plaintiffs in seven were elected deputies, four to local legislative bodies, Voronezh (June 1, 2005), http://www.mmdc.narod.ru/caselaw/process_17/decision.doc; Sverdlovsk (Jan. 28, 2004), http://www.femida.e-burg.ru/show_doc.php?id=3184; Vladimir (Dec. 9, 2003), http://www.medialaw.ru/article10/7/2/04.htm; Sverdlovsk (Nov. 12, 2003), http://www.medialaw.ru/article10/7/2/13.htm, and three to the federal parliament, Arkhangel'sk (approximately Sept. 20, 2004), http://www.cjes.ru/femida/?page=2&a=ci&w=o&id=10; Saratov (Jan. 21, 2004), http://www.medialaw.ru/article10/7/2/10.htm; Vladimir (Nov. 28, 2003), http://www.medialaw.ru/article10/7/2/03.htm; plaintiffs in two were both local public administrators and the local administration itself (as a legal person), Riazan' (Feb. 24, 2005), http://www.mmdc.narod.ru/caselaw/process_18.html; Amur (Apr. 15, 2004), http://www.medialaw.ru/article10/7/2/01.htm); the sole plaintiff in one was a local administration, Sverdlovsk (June 1, 2004), http://www.sutyajnik.ru/rus/echr/rus_judgments/distr/beliaev_01_06_2004.htm; and the sole plaintiff in another was a local police official, Belgorod (Oct. 11, 2002), http://www.medialaw.ru/article10/7/2/02.htm. In another case, the plaintiff was a faculty member at a local university who also served as a consultant to the regional governor. Voronezh (approximately Feb. 17, 2004), http://www.mmdc.narod.ru/caselaw/process_15.html. Plaintiffs in the other six disputes were private individuals. For discussion of the standing of state and local agencies, as legal persons, to invoke defamation law, see discussion *infra* at Part VI.B.2.c. In seven of the disputes, the defendants also included third persons (private individuals or public officials) who made the allegedly defamatory statements (often in interview format) which then were disseminated by the defendant mass media outlet. For discussion of this "media dissemination of third party content" question, see discussion *infra* at Part VI.B.2.a.

146. *See, e.g.*, V. Bykov & D. Shishkin, *Stat'ia 10 Evropeiskoi Konventsii o zashchite prav cheloveka v grazhdanskikh protsessakh o zashchite dobrogo imeni* [*Article 10 of the European Convention on Human Rights in Civil Defamation Disputes*], ZAKONODATEL'STVO I PRAKTIKA MASS-MEDIA [LAW AND PRACTICE IN MASS MEDIA], Feb. 2002, http://www.medialaw.ru/publications/zip/90/1.htm. In this detailed exposition on the potential usefulness of Article 10 and the ECtHR's practice, the authors, an attorney

One other general observation may be made about the lower court decisions. At least until the SC's October 10, 2003 Explanation,[148] the courts were not acting under any form of compulsion from within the judicial hierarchy in citing and applying ECtHR practice. The SC had not ordained anything, nor had the CC. Thus, in terms of the operation of the ordinary courts' hierarchy, it is evident that the lower courts were being allowed to act independently and were indeed doing so. Thus, the movement toward internalization was not a result of a "top-down" ordering from Moscow to the regions.

This period culminated in the 2005 Explanation. The increasing number of lower court decisions, while providing upward hydraulic pressure, had been piecemeal and scattered; the 2005 Explanation, on the other hand, consolidated the results of the lower courts' practice and made the reconstruction of defamation law generally applicable throughout the ordinary court system.[149] The SC Plenum did not intend the 2005 Explanation to be a comprehensive analysis of the entire body of civil defamation law.[150] Rather, it was selective, while still addressing a number of the most challenging issues. The 2005 Explanation is comprised of a Preamble and nineteen sections addressing a variety of defamation law questions. The Preamble and first section set forth the foundation for the Explanation and general principles that apply to all subsequent sections. The remaining sections address selected defamation issues and seek to

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for an NGO (the Glasnost' Defense Foundation) and a newspaper (*Vedomosti*), stated that: "We proceed from the premise that it will be necessary to create conditions in which courts will be compelled to take into account the Convention, and, most of all, the practice of the European Court." *See* Resnik & Skolovskii, *supra* note 1.

147. For example, the impact of NGO lawyering is suggested in litigation that resulted in Voronezh (Mar. 24, 2005), http://www.mmdc.narod.ru/caselaw/process_14.html. In the July 21, 2004 trial court decision, where the defendant newspaper and reporter were found guilty of defamation and ordered to pay 150,000 rubles in moral damages, they were not represented by legal counsel. At the appellate court, they were represented by lawyers from the Central-Chernozem Center, *supra* note 144, who included references to ECtHR practice in their arguments. The appellate court set aside the trial court decision in its entirety and entered a new judgment.

148. October 10, 2003 Explanation, *supra* note 35.

149. The stated goal of the 2005 Explanation, *supra* note 2, was to advance the correct and uniform application of the law. *Id.* Preamble, para. 6.

150. As indicated by the Explanation's title, see *supra* note 2, the Court sought to review judicial practice in deciding defamation disputes. Paragraphs 5 and 6 of the Preamble state that in general the courts are handling their responsibilities effectively in this area, but that Russia's ratification of the ECHR has given rise to certain questions that require resolution; as a result, the Explanation was necessary to advance correct and uniform application of the relevant legislation.

clarify certain questions. We now turn to particular questions addressed in the Explanation that reflect the ECtHR's influence.

A. The Fact/Opinion Distinction

For over a decade, the ordinary courts' treatment of all "communications" (*svedeniia*) as subject to Civil Code Article 152 had been the most controversial aspect of the defamation law scheme.[151] Indeed, the question of whether the law should draw a legal distinction between statements of fact and opinion goes back to the introduction of civil defamation in the mid-1960s.[152] For example, in a series of Articles in 1997–98, proposals for recognition of the distinction[153] drew a spirited response from defenders of the existing structure.[154]

Beginning with its 1986 *Lingens* decision, the ECtHR took a very different approach. In *Lingens*,[155] a journalist was convicted under the defamation provisions of Austria's Criminal Code for publishing two articles sharply critical of the Austrian Chancellor.[156] The Austrian courts ruled that the statements were defamatory and that, under the burden of persuasion stipulated in the Criminal Code, the defendant journalist had not established their truthfulness. As a result, he was found guilty of defamation and ordered to pay a monetary fine.[157] In finding an Article 10 violation, the ECtHR articulated principles that it has voiced many times since, namely that Article 10 requires that expression of "value

151. A detailed analysis, including discussion of a number of ordinary court decisions, is found in E.A. Chefranova, *Kommentarii, in* Monika Makovei & E.A. Chefranova, *Evropeiskaia Konventsiia o zashchite prav cheloveka i osnovykh svobod: Stat'ia 10. Pravo na svobodu vyrazheniia svoego mneniia. [European Convention on Human Rights Defense & Primary Freedom: Article 10, Freedom to Express Opinion]* PRETSENDENTY I KOMMENTARII [PRECEDENT & COMMENTARY] 84–109 (2001), *available at* http://www.sutyajnik.ru/rus/echr/school/books/art10.pdf

152. See discussion of the differing views of Soviet scholars concerning the proper meaning of *svedeniia* in A.V. BELIAVSKII & N.A. PRIDVOROV, OKHRANA CHESTI I DOSTOINSTVA LICHNOSTI V SSSR [PROTECTION OF HONOR AND DIGNITY IN THE USSR], 53–59 (1971).

153. *See* Erdelevskii, *supra* note 106; Poliakov, *supra* note 106.

154. A. Cherdantsev, A. *Mozhno osporit' i mnenie [Opinions also may be disputed]*, ROSSIISKAIA IUSTITSIIA, Nov. 1997, at 51; V. Kazantsev & N. Korshunov, *V kakikh sluchaiakh kompensiruetsia moral'nyi vred? [In what circumstances should moral harm be compensated?]*, ROSSIISKAIA IUSTITSIIA, Feb. 1998, at 39, 40; L. Gros', *Eshche raz o svobode mneniia i zashchite chesti [Once again about freedom of opinion and protection of honor]*, ROSSIISKAIA IUSTITSIIA, Sept. 1998, at 19.

155. Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A) 11 (1986).

156. *Id.*

157. *Id.* paras. 21–29.

judgments" must be distinguished from assertions of fact.[158] Value judgments, the ECtHR declared, are not susceptible to evidentiary means of proof, and a defamation defendant cannot be required to prove their truth.[159] Having determined that the journalist's communications were value judgments, the ECtHR assessed his conviction under the "necessary in a democratic society" requirement in Article 10(2) and found that Austria had failed to satisfy it.[160]

The ordinary courts' internalization of ECtHR practice, particularly *Lingens*, has been decisive in the turnaround in Russia's approach to the fact/opinion question. This has been illustrated abundantly both in the lower courts' practice and in the 2005 Explanation. Starting with the *Karelia* decision, a number of lower court decisions used various devices to implement the fact/opinion distinction. Some courts, following *Lingens* closely, declined to put the burden of proving the truth on the defendant.[161] Others narrowly construed the terms "communications" or "defamatory meaning" in Article 152 to rule that the statements in questions did not qualify as one or the other: as a result, the plaintiffs failed to state actionable claims under Article 152.[162]

In the 2005 Explanation, the SC sought to resolve the fact/opinion distinction definitively.[163] The Court noted that Article 152(1) of the Civil Code requires the defendant to prove the truth of a defamatory communication in order to avoid liability.[164] However, citing the "position" of the ECtHR in interpreting Article 10,[165] the SC set forth a rule that courts must distinguish between allegations of fact and statements of opinion. The latter, the SC declared, cannot be the basis for judicial protection of reputation under Article 152 of the Civil Code because, as a subjective expression of the opinion and views of the defendant, they cannot be made subject to a test for proof of their accuracy.[166] In this way, by determining that statements of opinions cannot be "communications" (*sve-*

158. *Id.* para. 46.

159. *Id.*

160. *Id.* para. 47.

161. Sverdlovsk Civil Chamber Decision, *supra* note 122; Amur (Apr. 15, 2004), *supra* note 145.

162. Nizhnii Novgorod (Dec. 20, 2002), http://www.sutyajnik.ru/rus/echr/rus_judgments/distr/sannikov_20_12_2002.html; Sverdlovsk (Nov. 12, 2003), *supra* note 145; Sverdlovsk (June 1, 2004), *supra* note 145.

163. 2005 Explanation, *supra* note 2, § 9.

164. *Id.*

165. Regarding the SC's emphasis on the notion of the ECtHR "positions" (*pozitsiia*), see discussion *infra* Part VI.A.2.

166. 2005 Explanation, *supra* note 2, § 9, para. 3.

deniia),[167] the SC categorically excluded them from the scope of Article 152.

Of particular note is the fact that the SC did not establish any gradations in articulating this rule, such as considering the status of the plaintiff. However, in a further paragraph, the SC informed the courts that public officials who seek to enlist public opinion must, at the same time, be the object of political discussion and criticism in the mass media.[168] Public officials, the court added, must be subject to criticism in the mass media in regard to the performance of their duties because this is a necessary condition for the open and responsible performance of their powers.[169] The SC's purpose in making these statements is not clear. The Explanation does not state how they are to be applied in judicial practice, and by making some reference to the status of the plaintiff as a relevant consideration, they appear to contradict the categorical character of the rule set forth in section 9, paragraph 3.

The SC did, however, point out an important exception that is outside the strict defamation context: the possibility that an expression of opinion might be subject to liability as an "insult." The SC stated:

> If a subjective opinion was expressed in an insulting form, harming the plaintiff's honor, dignity, or business reputation, an obligation might be imposed on the defendant to pay compensation for the plaintiff's moral harm suffered as a result of the insult (Article 130 of the Criminal Code of the Russian Federation, Articles 150 and 151 of the Civil Code of the Russian Federation).[170]

As this statement indicates, the SC's closing of the door to defamation actions based on Article 152 for statements of opinion may be expected to increase the number of lawsuits based on other statutory provisions. In this regard, the statutory employment of the words "honor" (*chest'*) and "dignity" (*dostoinstvo*) in both Article 152 of the Civil Code and Article

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167. *See supra* note 67 and accompanying text.

168. 2005 Explanation, *supra* note 2, § 9, para. 4.

169. *Id.* The SC did not cite to ECtHR practice in citing these propositions, although they are closely related to principles articulated in the ECtHR's *Lingens* line of cases. However, the SC did base paragraph 4 on a "Declaration on Freedom of Political Debate in the Media," adopted by the Council of Europe's Committee of Ministers on February 12, 2004. The Declaration incorporates a number of principles that the ECtHR has set forth in its practice. EUR. PARL. ASS., *Delaration on Freedom of Political Debate in the Media*, 872d Sess., Doc. No. 872/5.1E (Feb. 12, 2004), *available at* https://wcd.coe.int/ViewDoc.jsp?id=118995.

170. 2005 Explanation, *supra* note 2, § 9, para. 6. As stated *supra* in Part IV.A.1.b, the Civil Code does not refer to insult (*oskorblenie*). However, the courts have incorporated its definition and elements from Article 130 of the Criminal Code into Articles 150 and 151 to establish a civil cause of action for harm to individual dignity.

130 of the Criminal Code likely will serve to perpetuate the blurring of the distinction between defamation and insult, even though they have distinct elements and seek to advance different interests.[171]

Another important aspect of the Explanation is indirectly linked to the fact/opinion matter. For the first time, the SC determined that the defamation plaintiff bears the burden of showing that the communication in question was defamatory in meaning[172]—a matter of considerable importance in judicial practice.[173] The imposition of this burden on the plaintiff reinforces the SC's exclusion of statements of opinion from the scope of Article 152. Because a statement of opinion cannot be a "communication," it cannot have a defamatory meaning for purposes of satisfying the elements of Article 152.[174]

B. Distinction Between Defamation and Invasion of Privacy

The 2005 Explanation took an important step in clarifying the distinction, often lost in judicial practice, between the elements that distinguish defamation claims from invasion of privacy. Protection of privacy is, along with protection of reputation, a protected interest in Article 150 of the Civil Code.[175] In the Explanation, the SC pointed out that an individual may suffer an actionable injury for invasion of privacy—even if the communication was factually accurate—if the communication concerned that person's private life.[176] At the same time, the Explanation also added that a claim for invasion of privacy is not actionable if the communication in question was disseminated by a media outlet in order to protect public interests.[177]

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171. *See* Potapenko 2005, *supra* note 39, at 8. In this regard, it should be noted that the *Chemodurov* application found admissible by the ECtHR on August 30, 2005 concerns insult. Among the applicant's arguments to the ECtHR is that the insult cause of action is not "prescribed by law," as required under Article 10(2) of the ECHR. Chemodurov v. Russia, App. No. 72683/01, Eur. Ct. H.R (2005). *See* further discussion regarding insult *infra* Part VI.B.2.d.

172. 2005 Explanation, *supra* note 2, § 9, para. 1. The Explanation also revised somewhat the definition of "defamatory meaning" from that found in its predecessor. *Id.* § 7, para. 4. However, it is not possible to determine if this was prompted by plurality principle concerns. Meanwhile, it should be noted that section 7, paragraph 4 says that "defamatory" statements [*svedeniia*] are statements about facts or events. Thus, the use of *svedeniia* lends itself to the notion that the only communications that can be defamatory are assertions of fact.

173. *See* Potapenko 2005, *supra* note 39, at 7; Golovanov 2005, *supra* note 123.

174. *See supra* note 67 and accompanying text.

175. *See* discussion *supra* Part IV.A.1.b.

176. 2005 Explanation, *supra* note 2, § 8, para. 2.

177. *Id.* In support of this proposition the SC cited the *Mass Media Law*, *supra* note 85, art. 49.5, and added, applying the plurality principle, that this norm is consistent with

C. Monetary Compensation for Harm to Reputation

The 2005 Explanation placed two new requirements on the courts in their determinations of the amount of monetary compensation for "moral" harm, which the Civil Code defines as "physical or mental suffering."[178] The new requirements are in addition to the Code's criteria of considering the victim's degree of physical and mental suffering (in light of the victim's individual characteristics) and the circumstances in which the harm was inflicted.[179] Furthermore, the Code requires the court to consider "the requirements of reasonableness and justice" in making the calculation[180] and to take into account "other circumstances worthy of attention."[181]

From these Code provisions, the SC fashioned the new standards in section 15 of the 2005 Explanation.[182] First, section 15 requires that the amount of compensation for a non-economic harm must be proportionate (*sorazmerna*) to the harm—a standard clearly adopted from the ECtHR's position on the proportionality of damages in defamation cases.[183] Second, in recognition of concerns that high damages awards might unduly burden the mass media, section 15 dictates that the amount of damages must not result in an "encroachment (*ushchemlenie*) on the freedom of mass information."[184] This certainly is an indeterminate standard, but one which conveys recognition of free press interests in the assessment of damages. Both steps again illustrate the SC's power and willingness in certain circumstances to refine applicable legislative acts.

Article 8 of the ECHR ("Right to Respect for Private and Family Life"). This growing public/private orientation of personality rights protection in Russia is one of the clearest indicators of new directions in Russian "defamation" (in the broad sense) law.

178. Grazhdanskii Kodeks RF [GK] [Civil Code] art. 151(1).

179. *Id.* arts. 151(2), 1101(2). The Code also generally requires assessment of the violator's degree of fault; however, an exception is made for defamation cases, where consideration of fault is excluded from the calculation. *Id.* This exclusion is in keeping with the fact that in defamation liability is not fault-based.

180. *Id.* art. 1101(2).

181. *Id.* art. 151(2).

182. Section 15 of the 2005 Explanation also expressly retained from the 1992 Explanation its controversial interpretation of Article 152 of the Civil Code that makes legal persons eligible to recover compensation for non-economic harms to business reputation. *See* 2005 Explanation, *supra* note 2, § 15. For further consideration of this point, and its possible conflict with the SC's proportionality requirement, see discussion *infra* notes 252–53.

183. Steel & Morris v. United Kingdom, 41 Eur. H.R. Rep. 22 (2005); Tolstoy Miloslavsky v. United Kingdom, 316 Eur. Ct. H.R. 51 (1995). *See also* Potapenko 2005, *supra* note 39, at 10.

184. 2005 Explanation, *supra* note 2, § 15, para. 2.

VI. PROSPECTS FOR FURTHER RE-EXAMINATION OF DEFAMATION LAW: THE SUPREME COURT'S "TAKE INTO ACCOUNT DIRECTIVE"

Lower court practice and the 2005 Explanation have reshaped important aspects of Russian defamation law. However, the SC did not intend that the Explanation be a comprehensive review of all civil defamation law.[185] Instead, the Explanation addressed certain pressing problems—most of all, the fact/opinion question. In this regard, it can be said that the Explanation for the most part settled the particular problems discussed above in Part V.

Meanwhile, however, a number of other questions presented under the civil defamation system remain unresolved.[186] The Explanation referred to some of these without resolving them, or did not address them at all. The question therefore arises as to whether the new directions of the past several years have any relevance for these "unresolved" areas. Will the current trend of reassessment continue, as reflected in the 2005 Explanation's recognition of the plurality principle and internalization of ECtHR practice? If so, will any of the unresolved areas be addressed through the perspective of the new approaches developed over the past several years?

One may expect that impetus will remain to address these questions, although the degree of its intensity must await further developments. However, certain considerations do suggest that attention will be given to further applications of the plurality principle and internalization of ECtHR practice. These include the continuing growth of the ECtHR's Article 10 practice, the continuing number of Russia-based applications to the ECtHR, the SC's "take into account" mandate, and the continued activity of NGOs.

If this set of assumptions is valid, before examining some of the unresolved questions, it is necessary to examine in detail the SC's "take into account" directive, as set forth in the October 10, 2003 Explanation and reiterated in the 2005 Explanation. It may be expected that much of the future direction of defamation law in Russia, as well as other areas of law implicating freedom of the press, will be decided under the general rubric of the "take into account" mandate. This is because, having recognized the major impact of the ECtHR's influence, the SC through its mandate has initiated a process where courts, practitioners, and scholars will seek to define further the legal effect in Russia's legal system of the ECtHR's Article 10 practice, at least in those areas of the ordinary courts' competence.

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185. *See supra* note 150 and accompanying text.

186. *See* discussion *infra* Part VI.B.

A. The "Take into Account" Directive

Although the text of the Constitution states that international agreements to which Russia is a party are binding internally in the Russian legal system,[187] it does not address the general question of the legal effect of external interpretations of binding treaty norms. The Russian Law on Treaties also is silent on the matter.[188] The Russian Parliament, however, did address the question to some extent in regard to the ECtHR in the March 30, 1998 ECHR Accession Act, which stated in relevant part that:

> The Russian Federation, in accord with Article 46 of the Convention, recognizes *ipso facto* and without special agreement the mandatory jurisdiction of the European Court of Human Rights on questions concerning the interpretation and application of the Convention and its Protocols in connection with asserted violations by the Russian Federation of provisions of these agreements, when the asserted violation has taken place after their entry into force for the Russian Federation.[189]

This text, however, is ambiguous. One reasonable reading would suggest that it simply addresses Russia's recognition of the ECtHR's competence to rule on the substantive merits of applications filed against Russia, but states nothing explicit regarding the domestic legal effect of the ECtHR's substantive rulings. Therefore, in the absence of constitutional authority or a clear directive from the legislature, the question of the legal effect of the ECtHR interpretations has been left up to Russia's courts.

The question of the legal effect of external interpretations of binding treaty norms is one of increasing visibility and acuity in domestic legal systems.[190] In the United States, it has arisen in the context of litigation concerning the effect of International Court of Justice decisions interpreting the Vienna Convention on Consular Relations.[191] As to the ECtHR interpretations of the ECHR, it has been addressed, for example, in the

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187. Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 15(4).

188. *See supra* note 46 and accompanying text.

189. ECHR Accession Act, *supra* note 95, art. 1 (*translated by* author). This language appears to have been grafted from former Article 46(1) of the ECHR, before it was amended pursuant to ECHR Protocol No. 11, which entered into force on November 1, 1998.

190. *See supra* note 12 (citing various commentaries).

191. *See, e.g.*, Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006). For a detailed study of the problem before *Sanchez-Llamas*, see Heather Finstuen, Comment, *From the World Court to Oklahoma Court: The Significance of* Torres v. State *for International Court of Justice Authority, Individual Rights, and the Availability of Remedy in Vienna Convention Disputes*, 58 OKLA. L. Rev. 255 (2005). Regarding the International Court of Justice generally in the United States, see Jordan J. Paust, *Domestic Influence of the International Court of Justice*, 26 DENV. J. INT'L L. & POL'Y 787 (1998).

United Kingdom[192] and Germany.[193] In Russia, in theory, the possible answers would appear to range from treating such interpretations as binding precedent, to giving them a less intensive legal effect,[194] to making their use totally permissive, to denying their recognition in any manner.

While signaling to the lower courts their expected posture toward Article 10 and the treatment of ECtHR practice, the SC's "take into account" directive, in the October 10, 2003 and 2005 Explanations, is indeterminate as to its scope and to the nature of the legal effect to be given to ECtHR "positions" (to use the term employed in the 2005 Explanation). As a threshold matter, what are ECtHR "positions?" Are they the operative parts of ECtHR judgments only, and perhaps only those in cases in which Russia was a party? Or, is the category of "positions" broader to include the reasoning in the ECtHR's case law? Beyond this question, what does the phrase "take into account" mean? Does it require the treatment of ECtHR positions as binding precedent, or something more akin to persuasive authority? Also, when an ECtHR position is applicable in a concrete case, how will this affect a court's approach to the applicable legislative acts?

1. The "Take into Account" Requirement and the Legal Effect of ECtHR Practice

As demonstrated by the SC's general pronouncements and the specifics of particular provisions in the Explanations, "take into account" appears to be comprised of two closely related components: (1) a prescription to avoid violations of the ECHR; and (2) implementation of this precept,

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192. See discussion *infra* note 198 concerning the 1998 U.K. Human Rights Act. *See also* Ian Sinclair, Susan J. Dickson & Graham Maciver, *National Treaty Law & Practice: United Kingdom*, *in* NATIONAL TREATY LAW AND PRACTICE, *supra* note 12, at 727, 742.

193. *See* discussion *infra* note 198 (concerning the German Federal Constitutional Court's October 14, 2004 decision).

194. These considerations reflect the comparative observation that the degree of "bindingness" of judicial decisions in legal systems can be viewed as a continuum. *See* D. Neil MacCormick & Robert S. Summers, *Further General Reflections and Conclusions*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 531, 545 (D. Neil MacCormick & Robert S. Summers eds., 1997). Therefore judicial decisions can carry something "less than formally binding normative force." *See* Zenon Bankowski, D. Neil MacCormick, Lech Morawski & Alfonso Ruiz Miguel, *Rationales for Precedent*, *in* INTERPRETING PRECEDENTS, 497–500 (1997). In sum, Bankowski *et al.*, call for consideration of a "decidedly non-monolithic approach to the concepts of precedent and of *stare decisis*." *Id.* at 497. In this regard, see the detailed discussion of three "models of reasoning from precedent" (labeled the "model of particular analogy," the "rule-stating model," and the "principle-exampling model") set forth by Bankowski et al., *id.*, and their applicability to the Russian context, in Marchenko, *supra* note 12, at 12, 19.

when a legislative act is in question, by means of statutory construction. The first of these focuses on anticipation of future ECtHR decisions involving Russia as a party, an exercise that must entail examination of the ECtHR's extensive practice. The second, while cognizant of the first, shifts its primary focus to proper judicial construction of the Russian statute that is applicable in the case before the court (e.g., Article 152 of the Civil Code).[195]

a. "Avoidance of Violation"

The SC's directives do not speak in terms of the binding nature of ECtHR practice and nothing in the SC's practice suggests that the Plenum had in mind such a mandatory effect. On the other hand, the mandatory nature of the SC's prescriptions, including the susceptibility to reversal by a reviewing court,[196] rules out the possibility of an open-ended grant to the ordinary courts of unreviewable discretion to consider ECtHR interpretations as simply a form of persuasive authority.

Instead, it is apparent that "take into account" envisions a mid-level degree of bindingness[197] that can be characterized in this fashion: the courts are required to act preventively, to avoid an unreasonably high level of risk that their decisions ultimately will result in findings of violation by the ECtHR.[198] I will call this an "avoidance of violation" stan-

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195. It is important to note, given the allocation of judicial competencies, *supra* Part II.A, that this function differs from judicial review of the compatibility of legislative acts with constitutional norms, a matter which gave rise to controversy between the SC and the CC. *See supra* note 27. Instead, this is not judicial review at all, because it is not testing the compatibility of any act with a superior norm with an eye toward possible invalidation of the former. Rather, it is using judicial construction of legislative acts in order to insure that neither the legislative act nor judicial acts applying it are deemed by a potentially subsequent decision maker—the ECtHR—to be incompatible with an international (not constitutional) norm.

The CC often confronts in its admissibility decisions the question of whether a purported constitutional infirmity is the result of a legislative act or judicial act. The answer determines whether or not the CC has competence. *See supra* notes 28–29 and accompanying text.

196. October 10, 2003 Explanation, *supra* note 35, § 9. Section 9 states that an ordinary court's failure to apply correctly international norms will be subject to reversal by a reviewing court.

197. *See* MacCormick & Summers, *supra* note 194, at 545.

198. A mandate for courts to "take into account" ECtHR practice is also found in at least two other domestic legal systems. The 1998 U.K. Human Rights Act, Chapter 42, Article 2 ("Interpretation of Convention Rights") states in relevant part:

> (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

dard. My conclusion is based in part on the text of the October 10, 2003 Explanation, which states that the courts must take into account ECtHR practice in order to avoid violations of the ECHR.[199] The SC cited both the ECHR Accession Act[200] and the Vienna Convention on the Law of

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> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights . . . .

Human Rights Act, 1998, c. 42, art. 2 (Eng.), *in* 7 Halsbury's Statutes of England & Wales 528 (4th ed. 2001), *reprinted in* 38 I.L.M. 464 (1999), *available at* http://www.opsi.gov.uk/acts/acts1998/19980042.htm. The Act came into force on October 1, 2000. *Id. See also* European Commission for Democracy Through the Law, International Conference on the Influence of the ECHR Case-Law on National Constitutional Jurisprudence, Kyiv, Ukr., Oct. 13–16, 2005: *The Influence of the ECHR on English Law: Before and After the Human Rights* Act, at 3 (Sept. 10, 2005) (*prepared by* Rt. Hon. Lord Justice Maurice Kay) (on file with the *Brooklyn Journal of International Law*) ("It is to be noted that the requirement is that the national court or tribunal 'takes into account' such judgments, decisions, declarations and opinions, not that it is obliged to give effect to them."). For extensive analysis of Article 2(1) of the Human Rights Act, see Roger Masterman, *Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' under the Human Rights Act*, 54 INT'L & COMP. L.Q. 907 (2005) and Roger Masterman, *Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg*, (2004) P.L. 725, 731–35.

The German Federal Constitutional Court also has adopted the "take into account" phrase for its standard for the legal effect of ECtHR practice. In its October 14, 2004 decision, the German Court stated:

> "Take into account" means taking notice of the Convention provision as interpreted by the [ECtHR] and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law. In any event, the Convention provision as interpreted by the [ECtHR] must be taken into account in making a decision; the court must at least duly consider it. Where the facts have changed in the meantime or in the case of a different fact situation, the courts will need to determine what, in the view of the ECtHR, constituted the specific violation of the Convention and why a changed fact situation does not permit it to be applied to the case.

Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2 Entscheidungen des Burdesverfassungsgerichts [BVerfGE] 1481 (2004), *available at* http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html, *translated in* 25 H.R.L.J. 99 (2004). In the German original, the word in paragraph 62 that is translated as "take into account" is "berücksichtigen." *Id.*

Thus, it should be noted that both of these approaches (U.K. and Germany) acknowledge the binding nature of the applicable ECHR *provision*, but to some extent leave it up to the courts to decide whether or not to adopt the ECtHR's *interpretation* of that provision. The Russian SC's "avoidance of violation" standard appears to require more of the courts than this.

199. *See supra* note 120 and accompanying text.

200. October 10, 2003 Explanation, *supra* note 35, § 10, para. 3. For the relevant text of the ECHR Accession Act, *supra* note 95, see *supra* note 189 and accompanying text.

Treaties,[201] to which Russia is a party, in articulating this standard.[202] My conclusion also is based on other SC pronouncements and other indicators.[203] For example, while it did not recite the October 10, 2003 Explanation's "in order to avoid violations of the ECHR" language in the "take into account" requirement, the 2005 Explanation did generally incorporate the earlier Explanation in its entirety.[204] The SC's December 19, 2003 Explanation also suggested that findings of violation by the ECtHR were among the SC's highest concerns,[205] as did the general atmosphere of concern regarding the status of Russian-based applications at the ECtHR at the December 23, 2004 SC Plenum.[206]

In sum, the chief guide to the ECHR is the interpretive practice of the ECtHR. Thus, prior ECtHR decisions serve chiefly as guides for anticipation of future ECtHR determinations, rather than binding precedent in themselves.

b. Canon of Construction

As a practical matter then, what approach is a court to take in order to avoid conflict with the ECtHR's Article 10 practice? In other words, in a given case, if the ordinary court chooses to recognize and apply the ECHR as an active source of law, as evidenced by elements of ECtHR interpretations, what exactly is the court to do with this finding in the event of a potential conflict between the applicable legislative act and the ECHR?

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201. October 10, 2003 Explanation, *supra* note 35, § 10, paras. 1–2. Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT), to which the SC cited, states:

> 3. [In the interpretation of a treaty] [t]here shall be taken into account, together with the context:
>
> > (b) [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . .

Vienna Convention on the Law of Treaties art. 31(3)(b), *opened for signature* May 23, 1969, 25 I.L.M. 543, 1155 U.N.T.S. 331. Adopted on May 22, 1969, the VCLT entered into force on January 27, 1980. *Id.*

202. October 10, 2003 Explanation, *supra* note 35, § 10, paras. 1, 3.

203. For an earlier proposal recommending an approach similar to "avoidance of violation," see S.A. Gorshkova, *Rossiia i iuridicheskie posledstviia reshenii Evropeiskogo suda po pravam cheloveka* [*Russia and the Judicial Consequences of the European Court's Decisions Concerning Human Rights*] ZH.R.P.., May–June 2000, at 91, 92, 100–101.

204. 2005 Explanation, *supra* note 2, § 1, para. 4.

205. *See supra* note 120.

206. *See supra* notes 124–26 and accompanying text.

One option would be that dictated by the SC's October 31, 1995 Explanation: if the applicable legislation conflicts with the ECHR, then the court should make a ruling of invalidity.[207] However, the more recent "take into account" standard does not appear to require or endorse this approach. The SC in the October 10, 2003 and 2005 Explanations did not mandate the "judicial review" directive of the 1995 Explanation.

Instead of requiring the courts to act as bodies of constitutional control, invalidating legislative acts deemed inconsistent with the ECtHR's Article 10 practice, it appears that the SC expects the ordinary courts to employ statutory construction to ward off future ECtHR findings of violation. While not explicitly expressing it as something resembling a canon of statutory construction, the SC itself demonstrated the use of this approach in its treatment of the fact/opinion question in the 2005 Explanation.[208] Under this approach, the courts need not, and should not, hold Article 152 of the Civil Code invalid; instead, they should construe it so as to make it unavailable to plaintiffs who seek recourse against statements of opinion. Thus, the SC is steering a path between the risks of future Russian violations at the ECtHR and the controversial step of invalidating legislative acts (here, the prestigious Civil Code).[209]

This much seems clear. However, what the 2005 Explanation did not do is explore the implications of the "ECtHR Practice/Positions" component of the "take into account" directive. It is necessary to attempt to do this if we are to assess the further implications of the 2002–2005 new directions for defamation law questions unsettled after the 2005 Explanation.

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207. Regarding the 1995 Explanation, see *supra* note 101 and accompanying text.

208. *See* discussion *supra* at notes 163–66 and accompanying text.

209. This latter observation is made in light of the controversy in the 1990s, now substantially diminished, between the SC and the CC over the latter's claims that the SC was intruding impermissibly into the CC's exclusive competence. *See supra* note 27.

2. The Nature of ECtHR "Practice" and/or "Positions"[210]

ECtHR decisions, both judgments and admissibility determinations, are required to set forth not only operative parts, but also the Court's reasoning.[211] The SC's October 10, 2003 Explanation did not define what it meant by ECtHR "practice." It is possible that it meant one of the following: (1) to limit "practice" to the operative parts of judgments in cases in which Russia is a party, thereby excluding the ECtHR's reasons; (2) to require or encourage the courts to reason by analogy from ECtHR determinations, whether or not they involve Russia as a party; or (3) to give some level of legal effect to the ECtHR's reasons, as reflected in its articulated "positions" in all its decisions—not just those in which Russia is or was a party.

It is evident that the SC intended the third of these options. Certainly, the courts are required to recognize and give binding effect to the operative parts of ECtHR judgments that find a Russian violation.[212] However, at least in regard to defamation, this never was an issue in the period in question, since the first ECtHR judgment against Russia in an Article 10 case was not rendered until July 2005.[213] Instead, the issue leading up to and including the 2005 Explanation was whether the reasoning in the full

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210. The October 10, 2003 Explanation, *supra* note 35, § 10, uses "*praktika*" [practice], but the 2005 Explanation, *supra* note 2, uses the word "*pozitsiia*" [positions] (twice using "*pravovye pozitsii*" [legal positions]). Because the latter was more recent and was devoted specifically to defamation, as well as the growing currency in Russian legal thought that the term is acquiring, I will use the term "positions" when either term might be applicable. *See* L.V. LAZAREV, PRAVOVYE POZITSII KONSTITUTSIONNOGO SUDA ROSSII (2003); N.S. Volkova, *Priemy formirovaniia pravovoi pozitsii Konstitututsionnogo Suda RF* [*The Methods of Forming Legal Positions of the Constitutional Court of the Russian Federation*], ZH.R.P., Sep. 2005, at 79; Potapenko 2005, *supra* note 39. As demonstrated in the literature concerning CC jurisprudence, *pravovye pozitsii* is used to designate more than just operative parts of judgments.

211. ECHR Article 45, paragraph 1, states in full: "Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible." ECHR, *supra* note 3, art. 45, para. 1. The operative part of an ECtHR judgment is that which states whether or not there has been a violation, and if there has, what the applicant's remedy is.

212. This is true both as a matter of Russia's international obligations, per ECHR Article 46, paragraph 1 (which states in full that "[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties." ECHR, *supra* note 3, art. 46, para. 1.) and its domestic law. Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 46(3), *translated in* BURNHAM ET AL., *supra* note 14, at 646 ("Everyone shall have a right, in accordance with international treaties of the Russian Federation, to apply to inter-state organs concerned with the protection of human rights and freedoms if all available domestic remedies of legal protection have been exhausted."); ECHR Accession Act, *supra* note 95.

213. Grinberg v. Russia, App. No. 23472/03, Eur. Ct. H.R. (2005).

range of the ECtHR's extensive Article 10 practice must be given some legal effect as a matter of domestic law.

Although the October 10, 2003 Explanation did not define "practice," it made clear that courts would be expected to do more than simply observe and implement the specific requirements of operative parts of ECtHR judgments in which Russia was a defendant. In addition to this, the Court stated that Russia must:

> take steps of a general character, in order to prevent the repetition of similar violations. Courts within the limits of their competency therefore must insure compliance with the state's obligations that result from Russia's accession to the Convention on Human Rights and Fundamental Freedoms.[214]

Subsequent Explanations also demonstrate that the SC intended that the term "practice" include the ECtHR's reasons. This is demonstrated, for example, in the December 19, 2003 Explanation's requirement of explicit citations in ordinary court judgments to "decisions of the ECtHR, in which were rendered interpretations of the ECHR's provisions" applied by the Russian court.[215] Most significantly, the 2005 Explanation, addressing specifically civil defamation law, pronounced emphatically and in detail on this aspect of the "take into account" requirement. For example: (1) the courts must interpret the provisions of ECHR Article 10 in conformity with ECtHR positions (*pozitsii*), articulated in its judgments;[216] (2) in deciding reputation disputes, courts must follow not only Article 152 of the Civil Code, but also Article 1 of the ECHR Accession Act to take into account the positions of the ECtHR, articulated in its judgments, concerning interpretation and application of the ECHR (especially Article 10);[217] and (3) in a concrete application of this approach, the SC addressed specific defamation law issues, in particular the application of the ECtHR's positions regarding the fact/opinion distinction.[218] In sum, "positions" as employed in the 2005 Explanation (or "practice," in the wording of the October 10, 2003 Explanation) should be read to mean "reasons" in all ECtHR decisions (both judgments and admissibility decisions.) ECtHR positions, therefore, include more than just operative parts of judgments or reasons in a specific judgment against Russia that the Russian courts are asked to recognize and enforce.

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214. October 10, 2003 Explanation, *supra* note 35, § 11, para. 2.
215. December 19, 2003 Explanation, *supra* note 120.
216. 2005 Explanation, *supra* note 2, Preamble, para. 3.
217. *Id.* § 1, para. 5.
218. *Id.* § 9, para. 3.

However, this is not quite the end of the inquiry, because it is necessary also to determine with more precision the types of extractable elements that may be found in ECtHR positions. This is because the key focus of the "take into account" requirement is the necessity of anticipating future ECtHR determinations—an exercise that will require, in addition to reasoning by analogy from the ECtHR's fact-intensive decisions, close assessment of the prospective value of its positions.

Positions,[219] as the SC appears to employ the term, are a court's interpretations—developed pursuant to textual, teleological, or other methodologies—upon which its decisions are based.[220] Positions are deemed to be interpretations of prospective value as distinct from the ECtHR's frequent fact-intensive determinations made pursuant to its proportionality analysis under provisions such as ECHR Article 10(2).[221]

For the purposes of this Article, it is useful to view the ECtHR positions as points on a continuum that ranges from high levels of abstraction (e.g., a free press is essential to democratic governance) on one end to specificity (e.g., prohibition against burdening a defendant with proving the truth of an opinion) at the other. Perhaps highly abstract principles are not the kinds of positions that the SC Plenum had in mind in formulating the 2005 Explanation. On the other hand, in this author's opinion, recognition of the relevance of such foundation principles is essential to application of the inherent nature of the SC's "take into account" directive and its "avoidance of violation" standard.[222]

3. The Practical Consequences of the "Take into Account" Mandate

If observed and enforced with rigor in the first instance and higher ordinary courts, the "take into account" mandate has the potential to pose considerable demands and logistical challenges on the courts and parties in defamation disputes. The ECtHR's Article 10 practice is voluminous, including a great many decisions on admissibility and inadmissibility of

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219. "Positions" are an extractable element under "practice." The SC, here, appears to be employing the notion of "positions" found in the CC's practice. *See* LAZAREV, *supra* note 210 (suggesting the prospective value of ECtHR "Reasons").

220. *Id.* at 10.

221. Although the ECtHR usually sets forth Positions (often citing to earlier judgments) in its decision, these often in themselves do not determine the result in the case. Instead, the outcome often turns on fact-intensive proportionality analysis under the "necessary in a democratic society" standard in Article 10(2). By themselves, these proportionality determinations provide little prospective value, except for the opportunity to reason by analogy from the facts.

222. The fact is that in many cases an explicit ECtHR position of high specificity might not be available, but more abstract positions will still be applicable in resolving the particular problem.

applications,[223] and is at times quite complex. For attorneys and the courts this will place a high premium on familiarity with ECtHR practice, including even positions articulated in judgments where Russia was not a party.[224] In turn, these demands will present logistical challenges, such as insuring the availability of translations of ECtHR decisions.[225]

B. Unresolved Questions Viewed Through the "Take into Account" Prism

1. Public Interest Justifications

Many of the ECtHR's positions, particularly many principles reiterated regularly in its Article 10 practice, are grounded in, or are extensions of, instrumentalist public interest justifications that the ECtHR has identified as undergirding the freedom of expression guarantees in Article 10.[226] Although the Court regularly cites to both individual self-fulfillment and public interest justifications for freedom of expression guarantees, the latter generally receive far greater elaboration in cases involving the

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223. It is possible that the SC did not intend to include ECtHR admissibility decisions in the "take into account" standard. The October 10, 2003 Explanation, *supra* note 35, § 10, does not limit "*praktika*" to "*Postanovleniia*" [Decrees, or Judgments], but Article 1 of the 2005 Explanation, *supra* note 2, does use this term. However, in this author's opinion, the inclusion of admissibility decisions would be more consistent with the SC's apparent concerns. Admissibility decisions can be very instructive as to the thinking of the ECtHR, and to ignore them would seem to blunt the force of the prospective, anticipatory value of the "avoidance of violation" approach.

224. If this is the case, it does not of course necessarily mean that resolution of future questions will be resolved in favor of free expression interests. Instead, it means that courts (assisted by legal representatives) will need to probe the ECtHR's practice in seeking to comply with the determination under the "avoidance of violation" approach of whether a significant risk might be created that the ECtHR will find an ECHR violation.

225. Golovanov & Potapenko 2005, *supra* note 68, at 20–21, present an interesting discussion about the practical problems of using ECtHR practice (e.g., translations of judgments in cases not involving Russia). *See also* Danilenko, *Implementation of International Law*, *supra* note 6, at 69; Golovanov 2005, *supra* note 123, at 2.

226. Analysis of the ECtHR case law indicates the heavy reliance which the ECtHR has placed on public interest theory in the development of many of its Positions. Much of the ECtHR's practice in defamation cases is a cluster of assumptions concerning the role of free expression guarantees: for example, that the exercise of rights guaranteed under the ECHR not only enhances individual self-fulfillment, but also instrumentalist goals; that of these institutional goals, primacy is accorded to the maintenance and promotion of democratic governance; that the press plays an essential role in the maintenance of effective democratic governance; and that the press must be free in order to perform that role. These assumptions, or principles, provide a rationale of considerable cumulative weight when matched in the ECtHR's commonly used balancing methodology against other individual or public interests.

defamation context.[227] Without public interest theories, little apparent justification exists for giving greater weight to free expression interests at the expense of the interest in protecting against harm to reputation.[228]

In Russia, the SC and some lower courts recently have recognized to a limited extent the relevance of public interest considerations in the defamation context. For example, this notion appears in the 2005 Explanation in several ways: as a general foundation in the Preamble and Article 1 for adoption of the plurality principle; as a directly applicable basis for the SC's positions on invasion of privacy and its limits—in the case of mass media defendants—on monetary compensation for non-economic harms; and as a proposition (without specific applicability) relevant to the fact/opinion distinction.[229]

Some lower court decisions have cited public interest justifications for the protection of freedom of expression that the ECtHR has identified in its practice. For example, they have used them to limit the construction of "defamatory meaning," not only in regard to statements of opinion, but even as to assertions of fact.[230] They also have ruled that public officials must tolerate more criticism than private plaintiffs,[231] that the public official status of a plaintiff should be taken into account in the assessment of the amount of non-economic damages,[232] and that public interest considerations are relevant to the question of the standing of public bodies to seek recourse for harm to reputation.[233]

In these early stages, however, this compilation of examples does not point to development of a coherent, inter-connected body of principles

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227. For example, compare the extensive elaboration of pubic interest theory in *Lingens* to the brief reference to individual self-fulfillment in the same judgment. Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A) 11, 26 (1986). *See also* Grinberg v. Russia, App. No. 23472/03, Eur. Ct. H.R. (2005), paras. 23–24.

228. For discussion of these two theories, including their respective benefits and limitations, see Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 772 (1986) ("Even more significantly, self-expression theories do not provide a reason for protecting those self-expressive activities that can cause harm to others.").

229. *See* discussion *supra* Part V.

230. Karelia decision, *supra* note 109; Saratov (Jan. 21, 2004), *supra* note 145; Amur (Apr. 15, 2004), *supra* note 145; Sverdlovsk (Apr. 14, 2005), http://www.femida.e-burg.ru/show_doc.php?id=4015. *See also* Golovanov & Potapenko 2005, *supra* note 68, at 15.

231. *See, e.g.*, the November 28, 2003 Vladimir decision, *supra* note 145.

232. Sverdlovsk District Court Decision (Nov. 20, 2003), *supra* note 122.

233. *See* discussion *infra* at Part VI.B.2.c.

for application in the practice of the ordinary courts.[234] The references in the 2005 Explanation, although seemingly not connected by a common thread, provide evidence that there is some movement among the SC judges toward consistent positions. At the same time, the dampening revision of public interest language from an earlier draft of the Explanation reveals what is perhaps considerable doctrinal ambivalence on these questions.[235] Meanwhile, as will be discussed below, some lower courts have attempted to develop approaches, based on ECtHR public interest principles, toward some of the remaining unsettled questions in defamation law.

It is evident that to meet the "take into account" standard, with its "avoidance of violation" component, the courts will need to continue to explore means of applying the ECtHR's emphasis on public interest justifications. For example, a particularly pressing question, reflected in certain lower court decisions, is whether those considerations are best met by: (1) focusing on the status of the plaintiff; (2) determining whether the subject matter of the impugned communication was one of public significance; or (3) choosing an approach that combines the two.[236] This is a question that the U.S. Supreme Court struggled with in the early 1970s: whether to condition the intensity of external norm intervention into defamation disputes on case-by-case determinations of the presence or absence of public significance in the impugned communication, or on a more categorical rule based on the status of the plaintiff.[237] The 2005 Explanation's enigmatic language regarding public offi-

234. For example, one notes that the absence of public interest considerations in section 9 of the 2005 Explanation, *supra* note 2, even though a series of such justifications served as the foundation for the ECtHR's *Lingens* decision.

235. October 19, 2004 Draft Explanation, § 18 (Oct. 19, 2004) (on file with the *Brooklyn Journal of International Law*). In this version, section 18, the forerunner of the final version of section 15 in the 2005 Explanation, stated that when assessing damages for non-material injury, a court must consider not only the Civil Code's criteria in Articles 151, paragraph 2, and 1101, paragraph 2, but also the "public interest in the dissemination of information and good-faith commentary, and the necessity of promoting unfettered discussion of questions of public significance." This is a stronger statement of public interest considerations than those found in the somewhat nebulous formulation requiring courts in assessing monetary compensation to avoid "infringement of the freedom of mass information."

236. Regarding public officials, see S.V. Potapenko, *Diffamatsiia i rossiskaia sudebnaia praktika v kontekste opyta Evropeiskogo suda po pravam cheloveka* [*Defamation and Russian judicial practice in the context of the experience of the European Court of Human Rights*] KNIZHNAIA POLKA "PRAVO I SMI," Item 43, 2004, http://medialaw.ru/publications/books/echr2/index.html.

237. A plurality of the Court adopted the matter of public significance approach in *Rosenbloom v. Metromedia*, 403 U.S. 29, 43–45 (1971). However, three years later, the

cials in its discussion of the fact/opinion distinction[238] appears to reflect similar considerations, although its message is unclear. Overall, section 9 of the Explanation appears to present a categorical rule barring the availability of Civil Code Article 152 to all plaintiffs when the impugned statement is an opinion. However, the Plenum's discussion about public officials in section 9, paragraph 4, suggests that perhaps this bar is imposed only on public officials in regard to the performance of their duties. As an alternative, the Plenum indicated that courts, in cases involving public official plaintiffs, should be more expansive in their assessment of whether a particular communication is one of opinion. As it stands, that discussion provides little concrete guidance to the lower courts.

In sum, two general questions are presented by the ECtHR's practice and the ordinary courts' growing attention to the public interest components in that practice. The first is whether the scope of public interest considerations will be extended to questions beyond those addressed fully in the 2005 Explanation, and the second is how the practical application of these justifications should be formulated.

2. Specific Questions

In defamation, as a general matter, the question of "interference" is settled. The SC's positions in the 2005 Explanation are based on the SC's conclusion that defamation law implicates the exercise of freedom of expression.[239] Based on this, it is apparent that, unless the SC undertakes a major reversal, it will eventually require the ordinary courts to extend the plurality principle to defamation issues not addressed in the 2005 Explanation.

This section examines certain questions which the SC has not examined through the perspective of the plurality principle. A number of lower court decisions have applied the principle to some of these questions.

a. Media Dissemination of Third-Party Content

In a number of the lower court disputes examined in this study, journalists and mass media outlets were named as defendants along with, or

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Court abandoned this approach in favor of the rule that a plaintiff deemed "private" will confront a more relaxed constitutional standard than will a public official or public figure. Gertz v. Welch, 418 U.S. 323, 347 (1974).

238. *See* discussion *supra* note 168 and accompanying text.

239. *See* 2005 Explanation, *supra* note 2, Preamble, § 1. These speak of protection of reputation as a whole, without delineating specific aspects of it.

in place of, third persons who were the originators of the impugned allegations or opinions subsequently disseminated by the media defendants.[240] For example, these arise in regard to liability for publication or broadcasting of an interview, or in regard to publication of a guest (non-employee) commentator.[241] The cases do not suggest the possibility that distinctions between the originator and the disseminator might be legally significant, although the Mass Media Law provides certain exemptions for dissemination of government information.[242]

The ECtHR has addressed this question and adopted a position, quite explicit, that the Russian courts should consider it under the "take into account" requirement. In the case of *Pedersen & Baadsgaard v. Denmark*,[243] the ECtHR Grand Chamber found that Denmark did not violate Article 10 by convicting two journalists who were found to have made allegations of fact, on the basis of an interview with an eyewitness of the event in question, against a police official. In the judgment, the Grand Chamber articulated a position on the general treatment under Article 10 of media dissemination of interviews and other statements by third parties:

> In news reporting based on interviews, a distinction also needs to be made as to whether the statement emanates from the journalist or is a quotation of others, since punishment of a journalist for assisting in the

240. Sverdlovsk (June 1, 2004), *supra* note 145; Amur (Apr. 15, 2004), *supra* note 145; Voronezh (approximately Feb. 17, 2004), *supra* note 145; Sverdlovsk (Jan. 28, 2004), *supra* note 145; Saratov (Jan. 21, 2004), *supra* note 145; Vladimir (Dec. 9, 2003) (allegedly defamatory statements made at a news conference), *supra* note 145; Sverdlovsk (Nov. 12, 2003), *supra* note 145; Karelia (Mar. 12, 2002), *supra* note 109. Meanwhile, at least two of the pending cases before the ECtHR—*Filatenko v. Russia* and *Dyuldin & Kislov v. Russia*—also fall into this category of cases. *See* Filatenko v. Russia, App. No. 73219/01, Eur. Ct. H.R. (2004); Dyuldin & Kislov v. Russia, App. No. 25698/02, Eur. Ct. H.R. (2004).

241. Sverdlovsk (June 1, 2004), *supra* note 145 (newspaper interview: guest interviewee); Voronezh (approximately Feb. 17, 2004), *supra* note 145 (newspaper column: guest commentator); Sverdlovsk (Jan. 28, 2004), *supra* note 145 (newspaper and television interviews: guest interviewee); Saratov (Jan. 21, 2004), *supra* note 145 (newspaper interview: guest interviewee); Vladimir (Dec. 9, 2003), *supra* note 145 (newspaper publication of local public official's news conference); Sverdlovsk (Nov. 12, 2003), *supra* note 145 (television interview: guest interviewee).

242. Journalists may not be held liable for information that originated in press releases of state authorities, organizations, agencies, companies, or public associations or if such information is a verbatim reproduction of statements by officials of state authorities, organizations or public associations. *Mass Media Law*, *supra* note 85, art. 57(3)–(4).

243. Pedersen & Baadsgaard v. Denmark, App. No. 68693/01, Eur. Ct. H.R. (2004). Lending particular weight to *Pedersen* is the fact that it was decided by the ECtHR Grand Chamber. For discussion of *Pedersen*, see Kozlowski, *supra* note 51, at 152–53.

> dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. Moreover, a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas.[244]

This position provides a basis upon which the Russian ordinary courts could examine the facts of a dispute to apply a material distinction between circumstances in which a journalist or news media outlet is acting as repeater, and therefore should be insulated from liability, or has added its own factual assertions based on the third person's statements. Resolution of these questions perhaps could be pursued via interpretation of "communication" (*svedenie*) or "defamatory meaning" in Article 152 of the Civil Code along the lines of the SC's canon of construction under the "take into account" requirement.

b. Monetary Compensation to Legal Persons for Non-Economic Harm

The Civil Code is ambiguous on a question that has received considerable attention: whether a legal person has standing to recover monetary compensation for non-economic harm to its business reputation.[245] Under one reading, Article 152(7) of the Civil Code states that the rules of Article 152 concerning business reputation of a "citizen" apply to legal persons as well as the *grazhdanin* (physical person). Under another, they are not eligible because it is not possible for a legal person to experience "moral harm," which Article 151 of the Code defines as "physical and mental suffering."[246]

Russia's three high courts have addressed this question in various ways. The SC consistently has directed the ordinary courts to permit legal persons to seek moral damages.[247] Also construing Article 152 of the Civil Code, but in the opposite way, the Presidium of the Supreme *Arbitrazh* Court in three separate supervisory decisions in the late 1990s ruled that legal persons were not eligible for the moral damages remedy due to their lack of capacity to experience physical and mental suffering.[248]

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244. Pedersen & Baadsgaard, *supra* note 243, para. 77.

245. Krug, *Harm to Business Reputation*, *supra* note 26.

246. Grazhdanskii Kodeks RF [GK] [Civil Code] art. 151(1).

247. 1992 Explanation, *supra* note 34, § 11; 2005 Explanation, *supra* note 2, § 15. Regarding section 15, see discussion *supra* note 182 and accompanying text.

248. Postanovlenie Prezidiuma Vysshego Arbitrazhnogo Suda RF ot 5 avgusta 1997 g. N 1509/97, *available at* http://arbitr.garant.ru/public/default.asp?no=12003127&

Meanwhile, as a matter of constitutional law, the CC in 2003 declared that Article 45(2) of the Constitution guarantees legal persons the right to pursue the moral damages remedy.[249] After *Shlafman*, and relying heavily on it, the *Arbitrazh* courts granted moral damages to the plaintiff bank (a legal person) in the *Al'fa-Bank v. Kommersant* litigation.[250]

In making these decisions, the various Russian courts did not examine the possible effect of the ECtHR's Article 10 practice on the legal persons question. Perhaps the ECtHR's pending admissibility decision regarding the *Kommersant* application will provide some insight into the ECtHR's view on this matter.[251] Meanwhile, however, under the "take into account" requirement, the SC might wish to consider the application of a position that the ECtHR has articulated in two decisions regarding the conformity of domestic court damages awards in defamation cases.

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249. *Opredelenie Konstitutsionnogo Suda RF ot 4 dekabria 2003 g. N. 508-O "Ob otkaze v priniatii k rassmotreniiu zhaloby grazhdanina Shlafmana Vladimira Arkad'evicha na narushenie ego konstitutsionnykh prav punktom 7 stat'I 152 Grazhdanskogo kodeksa Rossiiskoi Federatsii"* [*Decision of the Russian Federation Constitutional Court of December 4, 2003 "On denial of admission of the complaint of citizen Vladimir Arkad'evich Shlafman concerning violation of his constitutional rights by Article 152(7) of the Russian Federation Civil Code*], VKS, Mar. 2004), at 55, *available at* http://www.ksrf.ru:8081/SESSION/S_PL5va84h/PILOT/main.htm

Article 45(2) states in full: "Everyone shall have the right to defend his or her rights and freedoms by any means not prohibited by law." Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 45(2), *translated in* BURNHAM ET AL., *supra* note 14, at 646. The CC's determination was made in a decision finding inadmissible an individual complaint that claimed that Article 152, as construed by the ordinary courts, was unconstitutional. The applicant did not include Article 29 of the Constitution among his grounds for the claim of unconstitutionality. The CC relied heavily on an ECtHR decision, *Comingersoll S.A. v. Portugal*, in which the ECtHR ruled that a legal person has standing to seek a monetary remedy for non-economic harm sustained because of a civil process that exceeded permissible limits under Article 6 of the ECtHR. Comingersoll S.A. v. Portugal, 2000-IV Eur. Ct. H.R. 335, 365 paras. 34–35. For analysis of the *Shlafman* decision, see Sergei Kuzin, *Spory vokrug reputatsii* [*Disputes about reputation*], http://www.eurolawco.ru/publ/review_153.html; A. Erdelevskii, *O podkhode Konstitutsionnogo Suda RF k zashchite delovoi reputatsii iuridicheskikh lits* [*The Russian Federation Constitutional Court's Approach to the Protection of Legal Persons' Business Reputation*], KHOZ. I PRAVO, Apr. 2005, at 111–16.

250. *See* discussion *supra* note 26.

251. *Id.*

In *Tolstoy Miloslavsky v. United Kingdom* and *Steel & Morris v. United Kingdom*, the ECtHR stated that an award of damages for defamation must "bear a reasonable relationship of proportionality to the injury to reputation suffered."[252]

The ECtHR's position provides a different perspective from which to view the legal person question. Rather than the pure statutory construction approach employed by the High *Arbitrazh* Court in the late 1990s and by the SC, it interjects the ECtHR's proportionality principle based on the "necessary in a democratic society" element of ECHR Article 10(2). If the SC (or the Supreme *Arbitrazh* Court) were to internalize this position, it would require the court to examine whether a legal person has the capacity to experience the kind of harm that would sustain a damages award consistent with the ECtHR's standard. This perspective also would serve as a further consideration in the statutory construction of Article 152.[253]

c. State Agency as Plaintiff

In a number of cases, the defamation plaintiffs include state or municipal bodies, which as legal persons are viewed as having standing to seek recourse against harm to their business reputations.[254] For example, in two cases, local government administrations (as legal persons) and their chief administrators were plaintiffs in disputes in which local newspapers were among the defendants for having published critical statements.[255] In another, a city administration (the city of Ekaterinburg) was the sole plaintiff in a suit against an interviewee and the newspaper which published his remarks critical of the administration.[256]

The SC did not address this question in the 2005 Explanation. Meanwhile, at least one former defendant in the Russian courts has filed an application at the ECtHR, arguing that the Russian courts' finding of li-

252. Tolstoy Miloslavsky v. United Kingdom, 316 Eur. Ct. H.R. 51, 75 (1995); Steel & Morris v. United Kingdom, 41 Eur. H.R. Rep. 22 (2005), para. 96. Neither of these cases involved mass media defendants. However, it is doubtful that this is a material difference, given the overall tenor of the ECtHR's Article 10 jurisprudence.

253. It is conceivable that if the ordinary courts were to take such an approach, grounded in part on Article 10, that the CC would view this as running counter to its position in the *Shlafman* decision, which was based on the Constitution. *See* Kuzin, *supra* note 249 and accompanying text. This would raise a number of legal issues, including the competencies of the respective courts and the hierarchy of external norms.

254. *See* Potapenko 2005, *supra* note 39, at 2; Fedotov, *supra* note 123.

255. Riazan' (Feb. 24, 2005), *supra* note 145; Amur (Apr. 15, 2004), *supra* note 145.

256. Sverdlovsk (June 1, 2004), *supra* note 145.

ability in such circumstances was a violation of Article 10. The ECtHR found the application admissible on November 17, 2005.[257]

Opposition to the standing of public bodies as defamation plaintiffs is based on public interest considerations—that such a capacity provides an opportunity for a public entity to exercise a chilling effect over criticism, particularly in the mass media, not even of individual public officials, but of governmental institutions themselves. In addition, the argument is made that governmental bodies cannot possess a "reputation" comparable to the reputational interests of individual physical and legal persons.[258]

The matter of public bodies as defamation plaintiffs bears certain similarities to the question of a legal person's eligibility for monetary compensation for non-economic harm to its reputation. In both cases, under the autonomy principle, they are solely matters of statutory interpretation. The question then arises, under the plurality principle and the SC's "take into account" standard, whether these questions would be viewed any differently through the prism of Article 10 and ECtHR practice. In contrast to the legal persons question, where one quite explicit ECtHR position might be relevant, it appears that, regarding public bodies as plaintiffs, the potentially relevant ECtHR practice lies in a cluster of more abstract public interest considerations, many of which go back to their initial articulation in *Lingens v. Austria*.[259] These center on the role in democratic governance of critical comment and reporting on public affairs and the proposition that public authorities must tolerate more criticism than private persons.

If the SC and the lower courts were to undertake this analysis and agree with it at least in part, they would then face the question of what to do about it under the "avoidance of violation" approach. One of the lower courts already has addressed this question (while not explicitly citing Article 10 in this regard). In its April 15, 2004 decision, the Ivanovskii Raion Court of Amur Province dismissed the administration's complaint, holding that "a municipal organ is not a bearer of business

257. Romanenko & Others v. Russia, App. No. 11751/03, Eur. Ct. H.R. (2005). In the interest of full disclosure, it must be said that the author of this article served as a co-author of comments on admissibility that were filed with the ECtHR in July 2005.

258. *See, e.g.*, *Honouring of Obligations*, *supra* note 7, paras. 392–93.

259. Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A) 11 (1986), paras. 41 ("Freedom of expression . . . constitutes one of the essential foundations of a democratic society.") & 42 (Freedom of the press "affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders" and "freedom of political debate is at the very core of the concept of a democratic society.").

reputation and does not have a right to demand its judicial protection."[260] This was a narrow construction of the applicable statute—Article 152—and was consistent with the canon of construction approach in the SC's "take into account" directive.

d. Insult

Strictly speaking, the civil offense of insult is not a matter of defamation law: it dictates liability for negative appraisals of an individual expressed in an "indecent" form, not for communications that harm reputation through dissemination of false factual allegations. Unlike defamation, where the truth of the communication is a complete defense, there are not any affirmative defenses to a claim of insult.[261] However, as the 2005 Explanation demonstrates, insult and defamation are closely related. While opinion statements are generally to be excluded from liability in defamation questions, the court may find a violation if the impugned communication falls within the definition of insult in Article 130 of the Criminal Code.[262] In this regard, insult is a continuation of the debate over whether a legal distinction should be made between statements of fact and those of opinion. In Russia, opponents of such a distinction long have sought to make all defamatory communications subject to liability unless proven to be factually correct. It is likely that now this debate will shift from strict defamation to insult because of the ordinary courts' narrowing of "defamatory meaning" and the SC's general insulation of opinion statements from liability.

Viewed from the perspective of the "take into account" requirement, insult presents a number of questions. The first is the absence of clarity. In addition to the applicant's argument in the *Chemodurov* case before the ECtHR concerning the absence of definition in the Civil Code, the SC has blurred the distinctions between insult and defamation by citing the former's protection of reputational interests.[263] Particularly because

260. Amur (Apr. 15, 2004), *supra* note 145.

261. *See also supra* notes 1 and 83 and accompanying text. An example of a court's finding of insult is found in the Russian first-instance court's 2000 determination in Chemodurov v. Russia, App. No. 72683/01, Eur. Ct. H.R (2005). The impugned communication was a statement in a newspaper article that a provincial governor's rendering of advice to his aides on a budgetary matter was "abnormal." The court, in a determination upheld on appeal, concluded that the use of the word "abnormal" referred to the governor's personality and not his conduct, and therefore was expressed in an insulting form. Chemodurov v. Russia, App. No. 72683/01, Eur. Ct. H.R (2005).

262. 2005 Explanation, *supra* note 2, § 9, para. 6. *See* discussion *supra* notes 83, 170–71 and accompanying text.

263. *See* discussion *supra* notes 171–72 and accompanying text.

plaintiffs often ground their complaints in both defamation and insult, the SC should take steps to clarify the nature of the insult offense and its application.

Beyond this is the question of the applicability of Article 10. It is difficult to determine whether the SC views application of the insult offense as an interference, triggering the plurality principle, or whether purportedly insulting communications are subject to the autonomy principle. Perhaps the applicability of Article 10 may be inferred from the SC's inclusion of its brief insult discussion within the general framework of Article 9 and the entire 2005 Explanation. Meanwhile, it also should be noted that in *Chemodurov*, the ECtHR has admitted an application directed against Russia's treatment of the insult offense. In opposing the application, the Russian government nevertheless acknowledged that Russia's action was an Article 10 interference.[264]

Therefore, there is good reason to assume that the SC would find that the plurality principle applies. However, the ECtHR's positions in this area are somewhat inconclusive. It is clear that the ECtHR maintains its specific position, first articulated in *Lingens*, against requiring the defendant to prove the truth of an opinion statement. In the area of insult, this is consistent with the proposition that the truth or falsity of such a statement is not at issue. On the other hand, the ECtHR's practice also frequently employs a position apparently borrowed from the United Kingdom's "fair comment" doctrine: that under Article 10 the validity of an interference "may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive."[265] The ECtHR takes this "sufficient factual basis" factor into account as part of its proportionality analysis,[266] an exercise which in each discrete case is very fact-intensive. Thus, in this approach, the ECtHR strongly suggests that inquiry into the facts underlying the statement of opinion indeed can be relevant in deciding whether there has been a violation in insult cases.[267]

Meanwhile, however, the ECtHR also has applied a public interest component into its general treatment of statements of opinion. In *Grinberg v. Russia*, for example, the Court noted that, in addition to the fact that "[t]he facts which gave rise to the criticism were not contested," the "contested statement was made in the context of an article concerning an issue of public interest" (that of freedom of the media in the region) and

264. Chemodurov v. Russia, App. No. 72683/01, Eur. Ct. H.R. (2005).

265. Busuioc v. Moldova, App. No. 61513/00, Eur. Ct. H.R., para. 61 (2004) (citation omitted).

266. *Id.*

267. *Id.* (citing earlier ECtHR decisions).

"criticised the conduct of the regional governor, elected by a popular vote—in other words, a professional politician in respect of whom the limits of acceptable criticism are wider than in the case of a private individual."[268] It must be noted, however, that the ECtHR added to these considerations its conclusion that the applicant had "expressed his view in an inoffensive manner."[269] This suggests that the weight of the public interest considerations might have been reduced if the communication had been expressed in an insulting form.[270] Nevertheless, it is apparent that these factors should receive some consideration.

The SC has not introduced public interest considerations into the insult context. Here, due to the nature of the ECtHR's practice, it is unclear whether Russia would face a significant risk of violation in continuing to apply the insult offense in the way that it has. At the same time, however, the ordinary courts still should consider the introduction of public interest considerations in this area. Certainly, in light of the "take into account" standard, the courts should strongly consider the fundamental positions articulated, for example, in the *Lingens* line of cases: that public officials must tolerate greater criticism than private individuals in regard to critical communications on matters of public interest. Such an approach in itself would lend more certainty to resolution of future disputes; in addition, perhaps the application of public interest notions would help to bridge the long-standing divide between the supporters and opponents of the fact/opinion distinction, by giving the latter some comfort that Article 10 and other external norms will not be used to categorically deny recourse to private individuals suffering perceived injury from insulting statements.

VII. CONCLUSION

As far back as 1999, the late Dr. Gennady Danilenko predicted that at some point Russia's courts might gradually transform the ECtHR's case law into Russian domestic jurisprudence.[271] The study in this Article shows that this prediction was remarkably prescient.[272] Now, with the benefit of hindsight, we can see not only that this process has begun to take place, but how it is taking place.

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268. Grinberg v. Russia, App. No. 23472/03, Eur. Ct. H.R. (2005), para. 32.

269. *Id.*

270. The ECtHR never has taken a categorical position, for example, that Article 10 in all circumstances blocks a public official from pursuing legal recourse for purportedly insulting statements. This is why the cases are decided pursuant to fact-intensive proportionality analysis. *See generally* Kozlowski, *supra* note 51.

271. Danilenko, *Implementation of International Law*, *supra* note 6, at 68.

272. *See also* Maggs, *supra* note 39, at 482.

While the ordinary court system encompasses the vast majority of Russia's courts and is the main concern of this Article, the potential radiating effect of the ordinary courts' practice to the *Arbitrazh* courts and the CC is still an open question. Although the *Arbitrazh* courts hear a smaller number of defamation disputes than do the ordinary courts, the cases they do hear can be highly visible because of high awards of monetary compensation. At this point, the *Arbitrazh* courts have not directly addressed the sources of law question and have not considered the applicability of ECtHR practice in this area. It is quite possible that the ECtHR's handling of the *Kommersant* application, whatever the ECtHR decides, will be significant in assessing whether the *Arbitrazh* courts will continue with their present approach or consider revisions along the lines of those that the ordinary courts have undertaken.

The situation regarding the CC, meanwhile, is even more complex. The Court's Article 29 jurisprudence is not extensive, although in one area—the constitutionality of legislation regulating expressive activity in election campaigns—it has received considerable attention in a number of recent decisions.[273] Given the CC's lack of active engagement, ECHR Article 10 has become a far more influential source of law in defamation than has Article 29, which has long lain dormant in this area. For the long term, this imbalance is not a good thing. Perhaps the initial steps taken by the ordinary courts will stimulate new assessment of the place of Article 29 in Russia's constitutional law.

Meanwhile, as to the ordinary courts, this study to some extent dispels the more extreme popular image of these courts as unreceptive to new ideas. Indeed, as some of the lower court decisions demonstrate, judges in the provinces can be quite receptive to new theories. In this regard, it might be tempting to view the 2005 Explanation as a knee-jerk, panicked reaction to the ECtHR's pending *Grinberg* decision and the 2004 admissibility decisions. However, the steps examined in this Article did not happen overnight. At the SC, they can be traced back at least as far as the adoption of the October 10, 2003 Explanation, and earlier in the case of some lower courts.

Because of the implications of the "take into account" directive, the 2005 Explanation might have significant impact on the nature of legal analysis and argument in Russia. While it certainly is too early to tell,

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273. Decrees dated Oct. 30, 2003, Vestnik Konstitusionnogo Suda Rossiiskoi Federatsii [VKS] [The Russian Federation Constitutional Court Reporter] 2003, no. 6, p. 3; Nov. 3, 2003, Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2003, No. 44, Item 4358; Nov. 14, 2005, VKS 2006, No. 1, p. 3; November 21, 2005, SZ RF 2005, No. 47, item 4968; June 16, 2006, SZ RF 2006, No. 27, Item 2970.

perhaps in the long term it will have an impact on the broad political trends affecting press freedoms in Russia as well. Meanwhile, in contrast to the public expressions of concern about restrictions on press freedoms, the Russian legal academy does not appear to have engaged in significant open discussion or debate about these matters. Perhaps this is because press freedom in Russia is to a considerable extent viewed not as a legal or constitutional issue, but as a purely political issue. Certainly much of this must be traced back to lack of confidence in the courts among many press freedom advocates. Perhaps the developments examined in this Article will be an incipient step toward greater balance on these perceptions.

These thoughts certainly apply to Russia's external image as well. Russia joined the Council of Europe amid great skepticism, and criticism continues to this day, as reflected in recent Council of Europe actions such as the June 2005 PACE report.[274] However, in at least the narrow area of civil defamation, perhaps the in-bound aspect of the ECHR system is starting to take hold. In the end, these steps by the ordinary courts show that they have crossed the line from simple compliance with ECtHR judgments where Russia is a party, to the far broader and more significant goal of compliance with the obligation to respect the ECHR's norms within its jurisdiction.[275] In other words, the Russian ordinary courts, with the SC taking the lead, have determined that the policing of Russia's ECHR compliance will take place within Russia's legal system without sole reliance on the Strasbourg Court's supervision.

Despite the emphasis in this Article on rules and positions, the developments examined here in the end are more about method—examination of diverse means of viewing complex legal questions—than about specific rules. In this author's view, this is a positive thing: the notion of strict adherence to explicit ECtHR positions has its limits.[276] For one thing, the scope of questions that the ECtHR has addressed is limited by its function. Civil defamation, while it has been a particularly contentious field, is but one of many elements of the larger body of law that relates to freedom of speech and freedom of the press in Russia. Many, many other issues remain untouched by the type of analysis initiated by the ordinary courts in civil defamation—broadcast ownership and control and licensing, freedom of information, and criminal defamation, to identify several

274. *Honouring of Obligations*, *supra* note 7.

275. ECHR, *supra* note 3, art. 1.

276. Regarding the risks of a "compatibility-only" approach to ECHR rights, see Roger Masterman, *Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' Under the Human Rights Act*, 54 INT'L & COMP. L.Q. 907, 918 (2005).

examples. Therefore, an over-emphasis on the ECtHR's perceived pre-eminent authority could serve as a disincentive to the Russian courts' development of the Russian Constitution,[277] and in particular methodological inquiries into the free expression provisions of Article 29, which ultimately must be seen as relevant to these questions.[278] Perhaps spurred by the evident normative similarities with Article 10, the provisions of Article 29 are being cited with more regularity than before in the Russian courts, [279] but without the far greater attention paid to Article 10 and the ECtHR.[280] At its best, at some point, the developing applications of Article 10 will begin to merge with increased analysis of what should be its normative counterpart in Article 29. Ultimately, this would be the fulfillment of the goals of domestic incorporation and implementation envisioned in Article 1 of the ECHR.

277. *But see* Danilenko, *Implementation of International Law*, *supra* note 6, at 62 (regarding the courts' reliance in states of the former USSR on international law as an additional argument in support of their conclusions based on interpretation of constitutional provisions).

278. For discussion of Articles 10 and 29 (postulating that the latter should be broader), see Iu. Shul'zhenko, *Standarty Soveta Evropy v oblasti SMI i rossiiskaia deistvitel'nost'* [*Standards of the Council of Europe in the sphere of mass information media and Russian reality*], ROSSIISKAIA IUSTITSIIA, May 1999, at 8.

279. It is noteworthy that the crucial section 9 of the 2005 Explanation, *supra* note 2, identifies both Articles 10 and 29, but then goes on to cite and apply the "Position" of the ECtHR concerning the fact/opinion distinction.

280. For further discussion, see Golovanov & Potapenko 2005, *supra* note 68, at 5.